APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 20, 2001) (Decided: December 06, 2001)

Docket No. 00-9469

FRANCIS J. DEVLIN,
Plaintiff,

RICHARD G. KUNKEL, JOSEPH G. MURPHY, DANIEL ROSENBERG, DANIEL G. SANDERS, JAMES C. SNYDER, ANTHONY J. TRUHON, JOHN WANDZILAK, JR., JOHN F. BYRNES, WILLIAM A. DE MAURO, MICHAEL ELKINS, JERROLD I. EHRLICH, BEVERLY GLICKERMAN, GERALD HARRISON, JOHN F. LUCZUN, JOHN F. MULDOON, HARRY E. NICHOLSEN, RONALD D. ZAMMIT, STERLING E. CATHEY, LOUIS L. LEVINE, ELLEN H. PROPP, JOHN L. SHURTLEFF, JULES K. LAMBEK, and EUGENE F. HARRISON
Plaintiffs-Appellants,

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,
Defendant-Appellee.

BEFORE: JACOBS, F.I. PARKER, and SOTOMAYOR, *Circuit Judges*.

Appeal from the judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) entered on October 20, 2000, granting appel-

lee's motion for summary judgment and denying appellants' motion for summary judgment in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, challenging Empire Blue Cross and Blue Shield's decision to reduce life insurance benefits for its former employees who retired after 1989.

VACATED AND REMANDED.

MEREDITH H. SAVITT, Hite & Savitt, Albany, New York, *for Appellants*.

GARY H. GLASER, Seyfarth Shaw, New York, New York (Craig P. Pacernik, on the brief), *for Appellee*.

F.I. PARKER, *Circuit Judge*:

In 1998, defendant-appellee Empire Blue Cross and Blue Shield ("Empire") significantly lowered the amount of life insurance provided to retirees.[1] Plaintiffs-appellants are former employees of Empire who retired between 1989 and 1993. Plaintiffs seek to enforce the terms of the life insurance plan provided by Empire to its retirees, as those terms existed during their employment with Empire. In addition to their claim for injunctive and declaratory relief under §§ 502(a)(1) & (3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(1) & (3), plaintiffs assert claims for monetary relief under ERISA for wrongful reduction of benefits, for breach of fiduciary duty, and for failure to provide information summaries in a

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[1] This action has spurred at least two lawsuits in the federal courts of this Circuit: the instant case and another case, *Abbruscato v. Empire Blue Cross*, ___ F.3d ___ (2d Cir. 2001), which is also being decided today. These cases were heard in tandem by this Court. We issue two separate opinions in these cases because each set of plaintiffs asserts different arguments on appeal.

timely fashion. Plaintiffs also assert a claim based on promissory estoppel.

The district court (Barbara S. Jones, Judge) rejected plaintiffs' claims for relief, principally concluding that the relevant ERISA plan documents did not provide plaintiffs with a vested life insurance benefit at the previous level of coverage. *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV. 8520(BSJ), 2000 WL 1538605, at *4-*9 (S.D.N.Y. Oct. 18, 2000). On appeal, plaintiffs contend that the relevant plan documents provide them with a vested life insurance benefit in an amount equivalent to their final annual salary. Additionally, plaintiffs contend that they are entitled to recover benefits under a theory of promissory estoppel. Finally, plaintiffs assert a breach of fiduciary duty claim under ERISA § 404(a), 29 U.S.C. § 1104(a).

For the reasons set forth below, we agree with plaintiffs that the relevant plan documents can reasonably be interpreted to provide a vested life insurance benefit. We also agree that summary judgment was inappropriately granted to defendant on the promissory estoppel, breach of fiduciary duty, and penalty claims. We therefore vacate the district court's decision granting summary judgment to Empire and remand to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiffs were all employed by Empire for various lengths of time, with some plaintiffs having worked at Empire for over 40 years. All retired from Empire between 1989 and 1993. Some of these plaintiffs retired pursuant to an early retirement incentive program announced in 1992, known as the Voluntary Separation Opportunity Program ("VSOP"). Others retired pursuant to a similar program offered in 1993, known as the Voluntary Incentive Program ("VIP"). The remaining plaintiffs retired pursuant to Empire's normal retirement program.

Throughout plaintiffs' employment, Empire provided life insurance benefits at no cost to its employees and retirees. These benefits were described by Empire in a summary plan description ("SPD") distributed to employees prior to 1987:

> All graded employees, hired on a full-time basis, after a probationary period become a member of our Group Life Insurance Plan, while all full-time Executive Compensation Program are covered upon employment.
>
> In addition, retired employees, after completion of twenty years of full-time permanent service and at least age 55 will be insured.
>
> . . .
>
> Your life insurance is twice your annual salary, excluding overtime pay.
>
> . . .
>
> For eligible retirees, the group life insurance will be reduced 10% on the retirement date and in equal amounts on the next four anniversaries of the retirement date. That is, on the fourth anniversary of the employee's retirement, benefits will have been reduce [sic] 50% of the pre-retirement level *for the remainder of their lives* [sic].

J.A. at 522 (emphasis added).[2] This SPD contained no qualification or condition on these benefits, nor did it contain any

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[2] Another document apparently distributed after the quoted document, but also prior to 1987, contained virtually identical language describing the group life insurance benefits. J.A. at 527. The main difference between these two descriptions is that the later document provides that the

[Footnote continued on next page]

indication that Empire would or could later reduce or eliminate them.

In 1987, Empire created and distributed an employee handbook, entitled "Your Handbook," which also included a summary plan description of Empire's group life insurance benefits. Like the earlier plans, this plan provided no-cost life insurance benefits to employees at an amount equal to two times the employee's annual salary. For retirees, the plan Provided that:

> If you retire . . . at age 65 or older with 10 or more years of full-time service; *or* at age 55 or older with 20 or more years of full-time service; *or* at any age, with 30 or more years of full-time service, your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage *remains in force for the rest of your life, at no cost to you.*

J.A. at 73. The last sentence on the last page of this document informs employees that "[o]ther important information about [their] Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.'" J.A. at 79. Contained in the 'Benefit Administration' section is the following statement:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits [sic] of its employees. The company expects and intends

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[Footnote continued from previous page]
10% benefit reduction begins at age 65, whether the employee is an active employee or a retiree. *Id.*

> to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time.

J.A. at 83. This reservation of rights appears for the first time in 1987 in "Your Handbook." As noted, the earlier plan descriptions contain no similar language.

In 1992, Empire implemented the VSOP, a voluntary workforce reduction program. In connection with this program, Empire distributed materials outlining eligibility and program benefits. Participation in this program required eligible employees to "voluntarily resign from Empire in exchange for certain benefits." J.A. at 536. These "certain benefits" included life insurance coverage, on substantially the same terms as provided in the earlier plans. While the VSOP's description of health insurance benefits included an explicit reservation of Empire's right to adjust coverage, the description of life insurance benefits did not. In the "Administration" section of these materials, however, Empire "reserve[d] the right to amend and/or terminate the VSO Program at any time for any purpose." J.A. at 540. This section also warned that "Empire may or may not adopt new or modified programs or benefits or take other actions in the future that, depending on your individual circumstances, may be more or less advantageous to you than the current Program." *Id.*

In 1993, Empire offered the VIP, another early retirement incentive program similar to the VSOP. A document distributed in connection with this program informed employees that "[y]our insurance benefits may be extended to you for your lifetime. . ., depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify *or* if you would qualify *by adding five years to your age and five years to your service under the*

VIP." J.A. at 559. The VIP provided for life insurance benefits virtually identical to those described in earlier plans; that is, benefits were reduced by 10% on retirement and for four subsequent years, until reaching one's annual salary. Like the VSOP materials, the VIP's healthcare insurance description contained a reservation of rights, but the description of life insurance benefits did not. The VIP's Administration section included the following language:

> Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, up to the date on which that employee's Resignation and General Release and Covenant Not to Sue becomes effective. Empire also reserves the right to announce new and different plans and programs as business needs require.

J.A. at 562.

In late 1997, because of financial difficulties and in an effort to "remake itself as a corporation in the managed care environment and remain economically competitive," Empire reviewed its benefits plans. On June 24, 1998, Empire announced that the "Board of Directors voted to adopt a number of new benefit provisions for current employees [and] retirees" effective January 1, 1999. J.A. at 572. These new benefits provisions affected individuals who retired from Empire after January 1, 1989 and before June 23, 1998. Among the changes instituted by Empire was a reduction in life insurance coverage to a flat $7,500.

Many retirees wrote to Empire, demanding an explanation for this reduction in benefits and to obtain more information about Empire's decision-making process. In response, Empire informed these retirees that the reduction was necessary for Empire's financial health and that Empire had clearly "reserve[d] the right to modify or reduce benefits in its sole discretion[.]" J.A. at 626.

In late 1998 and early 1999, two groups of retirees filed suit in the Southern District of New York, asserting several ERISA claims as well as a claim of promissory estoppel. In June 1999, these cases were consolidated for all purposes. Essentially, these retirees claimed that the employee handbooks distributed prior to 1987 contain promises of lifetime life insurance benefits in an amount equal to their annual salary.

Upon cross-motions for summary judgment, the district court rejected plaintiffs' claim for benefits. First, the district court concluded that the relevant plan documents were either the 1987 "Your Handbook," the VSOP documents, or the VIP documents, depending on each plaintiffs' retirement program. *Byrnes*, 2000 WL 1538605, at *7. According to the district court, because each of these documents contained "unambiguous reservation of rights clause[s] . . . plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500." *Id.* at *8. The district court similarly rejected plaintiffs' breach of fiduciary duty and penalty claims under ERISA, concluding that Empire had acted in accordance with and had properly provided its employees with the relevant plan documents. *Id.* at *9-*10. The district court also granted summary judgment to Empire on plaintiffs' promissory estoppel claim, holding that plaintiffs had failed to "allege[] the extraordinary circumstances necessary to state a claim of promissory estoppel under ERISA." *Id.* at *10. Judgment was entered for the defendant, and this appeal followed.

II. DISCUSSION

Plaintiffs contend on appeal that the pre-1987 SPDs contained a promise of lifetime life insurance benefits at the annual salary level and that these benefits vested in the plaintiffs when they qualified for retirement by attaining age fifty-five and completing at least twenty years of service. Additionally, plaintiffs contend that the doctrine of promissory

estoppel bars Empire from unilaterally reducing the life insurance benefits. Finally, plaintiffs assert that Empire breached its fiduciary duty by providing them with false and misleading plan information.

We review the grant of a summary judgment motion de novo, and "reversal is required if there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996) (citations and internal quotation marks omitted)

A. Contractual Vesting

Plaintiffs claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which permits a civil action by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Essentially, plaintiffs assert under this section a "contractual right under a benefit plan." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999)

"ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *see also Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (stating the general rule that under ERISA an employer welfare plan is not vested and that an employer has the right to terminate or unilaterally amend the plan at any time).[3] "[I]f a

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[3] The parties do not dispute that life insurance benefits are such "welfare benefits" under ERISA. *See* 29 U.S.C. § 1002(1)

[plan] document unambiguously indicates whether retiree. benefits are vested, the unambiguous language should be enforced." *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("*Multifoods*"). Thus, even though Empire is "generally free" to modify its life insurance plan, if Empire promised vested benefits, those benefits will be enforced.

To ascertain if Empire made such a promise, we must examine the relevant ERISA plan documents. Plaintiffs urge us to review the pre-1987 SPDs distributed by Empire, which Empire concedes contained no reservation of rights to modify the benefits and which, plaintiffs argue, evince Empire's intent to vest lifetime life insurance benefits upon their eligibility for retirement. Both pre-1987 SPDs include language indicating that life insurance coverage after retirement would remain at a level equivalent to plaintiffs' annual salaries "for the remainder of their lives."

The district court concluded that this language did "not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired." *Byrnes*, 2001 WL 1538605, at *5. Without such "clear and express" language, the district court reasoned, the only reasonable interpretation of the pre-1987 SPDs was that life insurance benefits would be vested only if plaintiffs retired prior to 1987, when Empire issued "Your Handbook" which included an express reservation of rights clause. *Id.*

In reaching its conclusion, the district court relied on *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). We understand the district court's temptation to rely on the Fifth Circuit's decision in *Wise* as it presents facts similar to those presented here. In *Wise*, the defendant-employer issued SPDs that described healthcare benefits for retirees but failed to include any express reservation of the right to amend or terminate the Plan's benefit provisions. *Id.* at 932. When the defendant realized this failure, it issued

new SPDs which "la[id] the groundwork for future changes" by including a reservation clause. *Id.* at 933. Shortly after issuing these new SPDs, the defendant announced the termination of healthcare benefits for those retiring after a certain cut-off date. *Id.* The Fifth Circuit affirmed the grant of summary judgment to the employer, reasoning that it had not contractually vested its employees with free lifetime healthcare coverage because "[s]uch extra-ERISA commitments must be found in the plan documents and must be stated in *clear and express language*." *Id.* at 937 (emphasis added). *Wise* explained further:

> Aside from the fact that the underlying documents and the later SPDs *did* place employees on firm notice of the coming change, we find no reason or authority to conclude that pre-1985 silence in the SPDs is somehow tantamount to an affirmative contractual commitment and that El Paso's earlier SPDS impliedly cede the right to later amend or discontinue coverage. While clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence. There is nothing in the way of context, inference, or presumption to persuade us otherwise. Contractual vesting is a narrow doctrine. To prevail, Plaintiffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation.

Id. at 938.

Notwithstanding these similarities, the district court erred in relying on the standard for contractual vesting set forth in *Wise*. *Wise* requires a plaintiff opposing summary judgment to show a promise that is "clear and express" and to show "precise language denying the right to withdraw benefits." *Id.* at 937-38. We take a different view:

> In this Circuit, to reach a trier of fact, an employee does not have to "point to unambiguous language to support [a] claim. It is enough [to] point to written language *capable of reasonably being interpreted* as creating a promise on the part of [the employer] to vest [the recipient's] . . . benefits."

Multifoods, 116 F.3d at 980 (quoting *Schonholz*, 87 F.3d at 78). Our standard permits a plaintiff to get to a trier of fact based on ambiguous plan language, while the *Wise* standard requires clear and unambiguous language.

We have rejected *Wise* twice before. In *Schonholz*, we concluded that the plaintiff was *not* required to "point to unambiguous language to support her claim" and criticized the district court for holding that an employer's commitment to vest benefits "must be in 'precise language denying the right to withdraw benefits.'" *Schonholz*, 87 F.3d at 78 (quoting *Schonholz v. Long Island Jewish Med. Ctr.*, 889 F. Supp. 610, 615 (E.D.N.Y. 1995), which in turn quoted *Wise*, 986 F.2d at 938)). In *Multifoods*, we described a circuit split as to the summary judgment rules for contractual vesting, noting that *Wise* was among those requiring "clear and express language." *Multifoods*, 116 F.3d at 980. After noting the circuit split, we emphasized that, in this Circuit, a plaintiff need only "'point to written language *capable of reasonably being interpreted* as creating a promise'" to survive an employer's summary judgment motion. *Id.* (quoting *Schonholz*, 87 F.3d at 78)

Under our standard, then, the plaintiffs here must first identify "specific written language that is reasonably susceptible to interpretation as a promise." *Joyce*, 171 F.3d at 134. Plaintiffs direct our attention to two sentences within the pre-1987 SPDs. The first provides that "retired employees, after completion of twenty years of full-time permanent service and at least age 55 *will be insured*." J.A. at 522 (emphasis

added). We believe that this statement can be reasonably read as promising such insurance so long as employees retire after age 55 and have provided full-time permanent service to Empire for at least twenty years. This provision can be construed as an offer that specifies performance as the means of acceptance -- sometimes referred to as an offer for a unilateral contract -- and promises lifetime life insurance benefits upon performance.[4] Therefore, by "performing" (that is, working for at least twenty years until attaining the age of 55), the plaintiffs accepted this offer. *Restatement (Second) of Contracts* §45(1) (1981). Where the offeror did not explicitly reserve the power to revoke, such an offer cannot be revoked once the offeree has begun to perform. *See id.* § 45 & cmt. d ("The beginning of performance . . . completes the manifestation of mutual assent and furnishes considera-

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[4] We note that our decision in *Reiphelt v. Emhart Corp.* states that "ERISA preempts civil actions against employers for [welfare benefits] predicated on common-law contract principles." *Reichelt*, 921 F.2d 425, 431-32 (2d Cir. 1990). In *Reichelt*, we rejected the plaintiff's contention that the employer's severance plan created a "unilateral offer that employees accept by continuing to work for the employer" because "accepting plaintiffs' argument would nullify Congress's determination in structuring ERISA that welfare benefit plans . . . should be exempted from the stringent vesting requirements applicable to pension benefit plans." *Id.* at 432.

Here, plaintiffs do not rely on a common law contract claim to the exclusion of a claim under ERISA; instead, plaintiffs' claim under ERISA § 502(a)(1)(B), which is essentially "the assertion of a contractual right under a benefit plan." *Strom*, 202 F.3d at 142. As we recently held in *Multifoods*, "if an employer promises vested benefits, that promise will be enforced." *Multifoods*, 116 F.3d at 980 (citing 29 U.S.C. § 1132(a)(1)(B)); *see also Schonholz*, 87 F.3d at 78-79 (applying the common law of contracts in assessing a promissory estoppel claim under ERISA). Contract law therefore guides our determination of whether, under ERISA, plaintiffs are entitled to "enforce [their] rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

tion.").[5] Therefore, Empire's reliance on its 1987 SPD, "Your Handbook," for its reservation of the right to modify the life insurance benefits is unavailing. We reject Empire's argument because after the plaintiffs began performance, pursuant to the pre-1987 SPDs, Empire was not free to revoke.[6]

The second statement contained in the pre-1987 SPDs which plaintiffs invoke provides that life insurance benefits "will remain at [the annual salary level] *for the remainder of their* lives." J.A. at 527 (emphasis added). Such "lifetime" language, we believe, is sufficient to create a triable issue of fact as to whether Empire promised to vest retiree life insurance benefits at the stated level. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 605-08 (7th Cir. 1993) (en banc) (Posner, J.) (allowing case to go to jury based on written language stating that "both you and your spouse will be covered for the remainder of your lives"); *cf. Joyce*, 171 F.3d at 135 (reject-

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[5] New York law apparently follows the minority view that a unilateral contract offer is revocable up until performance is *complete*. *See Petterson v. Pattberg*, 161 N.E. 431 (N.Y. 1928). Empire's argument parallels this view: Because these employees retired after 1987, when the SPD containing the reservation of rights clause issued, they are not entitled to the disputed life insurance benefits.

However, in ERISA cases, state law does not control. Instead, general common law principles apply. In *Schonholz*, for example, we reversed where the district court relied on New York's formulation of promissory estoppel. *Schonholz*, 87 F.3d at 78-79 (relying on *Restatement (Second) of Contracts* § 90(1) for the elements of promissory estoppel and noting that "ERISA is a federal law regime . . . designed to eliminate the threat of conflicting state and local regulation")

[6] It is for this reason that Empire's reliance upon the VSOP or VIP documents' reservation of rights clauses likewise fails (assuming that these clauses in fact successfully reserved Empire's right to amend these plans).

ing contractual vesting argument where document did not include "language that affirmatively operates to create the promise of vesting" but noting that a promise of benefits for one's lifetime gives rise to a triable fact issue, citing *Bidlack*, 993 F.2d at 605-08); *Multifoods*, 116 F.3d at 982 (finding that no vesting where "statements simply indicate *who* would pay the costs of the plan" but "in no way indicate that Multifoods would *continue* to pay the cost of the plan for the retirees' lifetime.")

Applying the proper standard to these two statements contained in the pre-1987 SPDs, we conclude that they are indeed "capable of reasonably being interpreted" as creating a promise to vest lifetime life insurance benefits in those employees eligible for retirement. Because of the ambiguity of the language, the ultimate determination of whether Empire promised lifetime benefits should be left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language. *See Bidlack*, 993 F.2d at 609 (allowing parties to present extrinsic evidence to "disambiguate" a collective bargaining agreement's health benefits provisions).[7]

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[7] In this vein, plaintiffs have presented exit letters given to retiring employees which describe the retirees' life insurance benefits as a lifetime benefit: "The company provided life insurance that you have under our group program . . . will also be continued . . . . This amount will be reduced by 10% on your retirement date . . . and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement . . . until it reaches [a level equal to your annual salary] where it *will remain constant for life.*" J.A. at 611 (emphasis added). The letters included no indication that this coverage would be reduced or terminated. Such evidence arguably reinforces plaintiffs' interpretation of the relevant plan documents.

B. Promissory Estoppel

"[P]rinciples of estoppel can apply in ERISA cases under extraordinary circumstances." *Schonholz*, 87 F.3d at 78. A plaintiff must satisfy four elements to succeed on a claim of promissory estoppel: "' (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.'" *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999) (quoting *Schonholz*, 87 F.3d at 79). Additionally, "an ERISA plaintiff must 'adduce[] not only facts sufficient to support the four basic elements of promissory estoppel, but facts sufficient to [satisfy an] 'extraordinary circumstances' requirement as well.'" *Aramony*, 191 F.3d at 151 (quoting *Devlin v. Transp. Comms. Int'l Union*, 173 F.3d 94, 102 (2d Cir. 1999)). *Schonholz* provides an example of such extraordinary circumstances, where the employer used promised severance benefits to induce the plaintiff to retire. *Schonholz*, 87 F.3d at 79-80.

Plaintiffs argue that the district court erred by holding that "[t]o satisfy the extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part." *Byrnes*, 2000 WL 1538605, at *10. In *Schonholz*, we stated that "we . . . require, for purposes of ERISA, . . . that [plaintiff] demonstrate a promise that [defendant] reasonably should have expected to induce action or forbearance on her part." *Schonholz*, 87 F.3d at 79. We did not, however, explicitly define "extraordinary circumstances" or limit it to circumstances of inducement. In *Devlin*, we noted that "the remarkable consideration in *Schonholz* was the defendants' use of promised severance benefits as an inducement to persuade Schonholz to retire" and concluded that such circumstances were absent in that case, because the plaintiffs in *Devlin* could not demonstrate such inducement. *Devlin*, 173 F.3d at 102. Because

we conclude that plaintiffs here have demonstrated sufficient facts supporting intentional inducement to avoid summary judgment, we need not decide whether extraordinary circumstances other than intentional inducement would suffice.

To succeed on this claim, then, plaintiffs must, in addition to the four basic elements of promissory estoppel, point to circumstances "beyond the ordinary." *Aramony*, 191 F.3d at 152. In this vein, plaintiffs contend that the injustice suffered by them due to Empire's reduction in life insurance benefits is such an extraordinary circumstance. But "injustice" is one of the four basic elements of the claim, and therefore does not rise to the level of "extraordinary." *Devlin*, 173 F.3d at 102 ("[R]eliance is one of the four basic elements of promissory estoppel, and would not by itself render this case 'extraordinary.'").

Plaintiffs also contend that they were induced by Empire to work for over twenty and up to forty years in order to receive (inter alia) a particular level of life insurance coverage, and that Empire acted with the intent to induce by "distributing literature guaranteeing 'lifetime' benefits at 'no cost.'" Appellants' Br. at 29. The district court rejected this contention and noted if courts "were to consider it extraordinary every time an employee chose a job based in part on the quality of an employer's benefits package, the requirement of 'extraordinary circumstances' would lose all meaning." *Byrnes*, 2000 WL 1538605, at *10.

Contrary to the district court's conclusion, we believe that plaintiffs have demonstrated more than mere *acceptance* of employment at Empire in exchange for these benefits; instead, they have dedicated much of their working lives to Empire. Edwin R. Werner, Empire's former chief executive officer, stated in his deposition that Empire "probably would never be able to compete with some of the profit-making companies out in the world who were competing for the same employees . . . [I]n order to compensate . . . for the fact that

[Empire] might not be able to compete with some organizations that would like the same employees that we would like, we needed to treat our employees well. Our fringe benefit program needed to be respectable. . . ." J.A. at 771. From these and similar statements describing Empire's "promise" of lifetime life insurance benefits for retirees, a trier of fact could reasonably conclude that Empire intentionally promised lifetime life insurance benefits to lure (and retain) employees away from other firms paying higher salaries and then denied those benefits after the employees were of an age where they could neither make up the salary difference or obtain alternative benefits at a reasonable cost. If so found, we believe that such a practice constitutes "extraordinary circumstances" sufficient to support plaintiffs' promissory estoppel claim. Because we find that there are genuine issues of material facts with respect to plaintiffs' promissory estoppel claim, we vacate the grant of summary judgment to the defendants on that claim.

C. Breach of Fiduciary Duty under ERISA

Plaintiffs contend that Empire breached its fiduciary duties, as outlined in ERISA §§ 404(a)(1)(A), (B), and (D) providing that:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-. . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a). Plaintiffs' breach of fiduciary duty claims under ERISA §§ 404(a)(1)(A) & (B) are based on Empire's communications concerning their life insurance benefits. Specifically, plaintiffs focus on the retirement letters which indicated that life insurance coverage would be provided for life and on Empire's furnishing the 1987 SPD in response to inquiries concerning the benefit reduction. Plaintiffs' breach of fiduciary duty claim under ERISA § 404(a)(1)(D) alleges that Empire, in reducing their life insurance coverage to $7500, failed to act in accordance with the life insurance plan documents. The district court rejected all of plaintiffs' fiduciary duty claims, concluding that "Empire acted in accordance with the documents . . . in reducing plaintiffs' life insurance benefit" and "did not describe its benefits to the plaintiffs in a way that was misleading or dishonest; rather it described the plan accurately by setting forth what it intended to continue to offer to retirees while expressly reserving the right to amend or terminate the benefits." *Byrnes*, 2000 WL 1538605, at *9.

Because we disagree with the district court's underlying conclusion—that Empire acted in accordance with the plan documents and that Empire "described the plan accurately while expressly reserving the right to amend"—we must remand these claims in light of our remand of plaintiffs' contractual vesting claim. We provide the district court with the following guidance to be considered on remand.

First, we reject both Empire's assertion and the district court's conclusion that Empire was not acting in a fiduciary capacity when it reduced plaintiffs' life insurance benefits. ERISA provides that a "'person is a fiduciary with respect to a plan,' and therefore subject to ERISA fiduciary duties, 'to the extent' that he or she 'exercises any discretionary authority or discretionary control respecting management' of the plan, or 'has any discretionary authority or discretionary responsibility in the administration' of the plan." *Varity Corp.*

v. Howe, 516 U.S. 489, 498 (1996) (quoting ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A)). Although it is true that "[a]n employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary," *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995), Empire may not have been merely amending an existing retirement plan with respect to the life insurance benefits of these retirees. We have already concluded that, *with respect to these retirees*, Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. It therefore follows that Empire may have exercised discretionary authority with respect to the plan, and Empire's unilateral reduction in benefits and its communications about this reduction may have violated the plan documents and, in turn, ERISA § 404(a)(1)(D). With respect to the claims based on allegedly misleading communications, we likewise conclude that Empire may have been acting as a fiduciary when it communicated with its employees and retirees concerning the contents of the welfare benefits plan. *See Varity Corp.*, 516 U.S. at 502-03 (finding that where employer communicates with plan beneficiaries about the contents of the plan, an employer is acting in a fiduciary capacity for ERISA purposes where "reasonable employees . . . could have thought that [the employer] was communicating with them *both* as employer *and* as plan administrator" (emphasis added)); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001) ("Communicating information about future plan benefits is indeed a fiduciary obligation."); *see also Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998) (finding that an employer "may have acted in a fiduciary capacity when it explained its retirement program to the early retirees").

Second, regarding fiduciary duty claims under ERISA §§ 404(a)(1)(A) & (B), "[a] fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing

benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'" *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J. (quoting ERISA §§ 404(a)(1)(A) & (B)). Although "a fiduciary is not required to voluntarily disclose changes in a benefit plan before they are adopted," *Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir. 1996), a fiduciary also has "a duty to deal fairly and honestly with its beneficiaries," *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997). In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time. "[W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (concluding that Unisys had breached its fiduciary duty where it "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life—even though as the district court concluded in rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits"); *cf. Becher v. Long Island Lighting Co. (In re Long Island Lighting Co.)*, 129 F.3d 268, 271 (2d Cir. 1997) ("An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan."). On remand, the district court should permit a trier of fact to evaluate Empire's communications with plaintiffs for

affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire breached it.

Finally, we disagree with Empire's contention that "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." Appellee's Br. at 41. Plaintiffs' cause of action for their breach of fiduciary duty claims arises from ERISA § 502(a)(3) which allows plan participants, beneficiaries or fiduciaries to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or terms of the plan, or . . . obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). In *Varity Corp.*, the Supreme Court held that such claims alleging breach of fiduciary duty could be brought by individual plaintiffs because ERISA § 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by [ERISA] violations that § 502 does not elsewhere adequately remedy." *Varity Corp.*, 516 U.S. at 512. The Supreme Court further noted that, given ERISA's requirement that fiduciaries act "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1), "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513. We note that should plaintiffs' claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to enforce their rights under the plan fail, plaintiffs' breach of fiduciary duty claim is their only remaining remedy. *Varity Corp.* clearly provides that, where a plan participant has no remedy under another section of ERISA, she can assert a claim for breach of fiduciary duty under §502(a)(3) *Id.* at 515 (noting that ERISA's purposes would be furthered by granting a remedy where no other remedy is available); *see also Strom*, 202 F.3d at 149 ("[*Varity Corp.*] evidences a clear intention to

avoid construing ERISA in a manner that would leave beneficiaries . . . without any remedy at all.").

Varity Corp. further explained, however, that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief *normally* would not be 'appropriate.'" *Varity Corp.*, 516 U.S. at 515 (emphasis added). The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty; instead, the Court indicated that equitable relief under § 502(a)(3) would "normally" not be appropriate. Ultimately, we believe that the determination of "appropriate equitable relief" rests with the district court should plaintiffs succeed on both claims. This determination must be based on ERISA policy and the "special nature and purpose of employee benefit plans." *Id.* (internal quotation marks omitted). We therefore hold that *Varity Corp.* did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate. If the plaintiffs ultimately prevail on this claim upon remand, the district court must then fashion appropriate relief.

D. Penalties

Plaintiffs also press on appeal their claim for penalties under ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), for failing to provide requested plan information as required by § 104, 29 U.S.C. § 1024. Section 502(c)(1)(B) provides that "[a]ny administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant . . . within 30 days after such request may in the court's discretion be personally liable to such participant . . . in the amount of up to $100 a day from the date of such failure or refusal."

29 U.S.C. § 1132(c)(1)(B). Plaintiffs contend here, as they did below, that Empire is liable for penalties because it "provided [them] with documentation that . . . Empire knew or should have known did not apply to these individuals and did not govern their benefits." Appellants' Br. at 32. The district court rejected this claim, after determining that Empire furnished copies of the 1987 SPD in a timely fashion. *Byrnes*, 2000 WL 1538605, at *10. Because we are remanding to the district court, in part based on our determination that the *pre-1987* SPDs applied to these plaintiffs, we likewise remand plaintiffs' claim for penalties to the district court. We note, however, that Empire did provide the 1987 SPD within the 30-day time limit and that the ultimate assessment of penalties is a discretionary matter for the district court. In assessing a claim for penalties, courts have considered various factors, including "bad faith or intentional conduct on the part of the administrator, the length of the delay, the number of requests made and documents withheld, and the existence of any prejudice to the participant or beneficiary." *Pagovich v. Moskowitz*, 865 F. Supp. 130, 137 (S.D.N.Y. 1994) (citing cases). On remand, the district court should evaluate this claim in light of these factors.

III. CONCLUSION

For the foregoing reasons, we vacate the district court's grant of summary judgment to Empire and remand to allow plaintiffs to present extrinsic evidence, if any, to a trier of fact to illuminate the ambiguities present in the pre-1987 SPDs. We additionally vacate summary judgment with respect to the promissory estoppel, fiduciary duty and penalty claims and remand to the district court for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: June 20, 2001) (Decided: December 06, 2001)

Docket No. 00-9469

CALOGERA ABBRUSCATO, SAL AUTOLINO, GENEVIEVE BANGER, MARIE BRAMSON, ERNA SEALS-BROWN, VINCENT CARLIN, VINCENT CEFOLA, ELAINE CIRINO, VINCENT CIRINO, TIMOTHY CONNORS, JUANITA R. EVELYN, JEANETTE GRAVES, THOMAS HUGHEY, ELAINE V. HUTTON, RALPH LEGGETT, JOHN 0. McGEE, MARIA MELE, JOHN MEROLLA, CYRILLA R. PALERMO, ALBERT PEDOTA, MARY A. REIDY, NEVILLE SARGEANT, GEORGE SCHIRM, SHEILA SPARLING, MARY HOFFMEISTER-TRAVERS, JOHN D. VELLA, HOWARD WALSH, ESTATE OF JOANNA W. BLACKWOOD, ROBERT NOVAS, CATHERINE BRANDOFF, BARBARA L. McCARTHY, EUSTACE GRIFFITH, LULA MAE MILLER, MARTIN VARLEY, and GWEN ZUCKER,

Plaintiffs,

IRMA M. ALICEA, JACK BROOK, ARTHUR ENGLISH, JOSEPH FLEMING, ANTHONY HECKEL, MARIE MORRIS, ANN MUSTO, ROSE MARIE O'CONNOR, ELAINE BAILEY-PEREIRA, JAMES PHOTIS, JOHN PIRRO, MARY PURCELL, HENRY REYNOLDS, ALBERT RICUITO, SHEILA SANSOSTI, GERARD SUSSUNGHAM, JOSEPH L. CERRONE, JR., and DAPHNE SMALL,

Plaintiffs-Appellants,

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,
Defendant-Appellee.

BEFORE: JACOBS, F.I. PARKER, and SOTOMAYOR, Circuit Judges.

Appeal from the judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, Judge) entered on October 26, 2000, granting appellee's motion for summary judgment in this action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.*, challenging Empire Blue Cross and Blue Shield's decision to reduce life insurance benefits for its former employees who retired after January 1, 1989.

AFFIRMED in part, VACATED and REMANDED in part.

ALVIN GREEN and MARTIN SEHAM, Seham, Seham, Meltz & Petersen, New York, New York, *for Appellants*.

GARY H. GLASER, Seyfarth Shaw, New York, New York, *for Appellee*.

F.I. PARKER, *Circuit Judge*:

In this case brought pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq*, appellants challenge defendant-appellee Empire Blue Cross and Blue Shield's ("Empire") reduction in life insurance benefits to former employees who retired after January 1, 1989. Our decision in *Kunkel v. Empire Blue Cross and Blue Shield*, No. 00-9469, F.3d (2d Cir. 2001), also issued today, concerned a similar challenge to this same reduction. In *Kunkel*, we vacated the district court's grant of

summary judgment to Empire, principally concluding that the district court had applied the wrong standard to the retirees' claim that their life insurance benefits had vested pursuant to an alleged promise by Empire, and remanded to the district court for further proceedings. We issue a separate opinion in this case because these appellants base their claims for life insurance benefits on different documents.

For the reasons set forth below, we Vacate the summary judgment and remand appellants' claims in part, and affirm the grant of summary judgment in part.

I. BACKGROUND

The sixteen appellants are former Empire employees who retired between 1989 and 1998. Six of the retirees retired from Empire pursuant to an early incentive program offered in 1992, known as the Voluntary Separation Opportunity Program ("VSOP").[1] Two of the appellants retired from Empire pursuant to a similar program offered in 1993, known as the Voluntary Incentive Program ("VIP").[2] Some of the remaining appellants retired in the normal course, not pursuant to any early retirement incentive program. Others retired pursuant to a "Separation Agreement and General Release."

As in *Kunkel*, we set forth in some detail the language of the documents issued by Empire which describe the life insurance benefits.

In 1987, Empire created and distributed an employee handbook, entitled "Your Handbook," which included a summary plan description (the "1987 SPD") of Empire's group life insurance benefits. For retirees, this plan provided

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[1] These six appellants are Irma Alicea, Arthur English, Joseph Fleming, Anthony Heckel, Rose Marie O'Connor, and Gerard Sussungham.

[2] These two appellants are Marie Morris and Sheila Sansosti.

life insurance coverage at an amount equal to one's annual salary at retirement, provided at no cost to the retiree. Specifically, the plan stated that:

> If you retire . . . at age 65 or older with 10 or more years of full-time service; or at age 55 or older with 20 or more years of full-time service; or at any age, with 30 or more years of full-time service, your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage *remains in force for the rest of your life, at no cost to you.*

J.A. at 342 (emphasis added). The last sentence on the last page of this document informs employees that "[o]ther important information about [their] Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.'" J.A. at 348. Contained in the "Benefit Administration" section is the following statement:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits [sic] of its employees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. The company also reserves its right to amend each of the Plans at any time.

J.A. at 352 (the "reservation of rights" clause)

In 1992, Empire introduced the VSOP, a voluntary workforce reduction program. In connection with this program, Empire distributed materials outlining eligibility and program benefits. Participation in this program required eligible employees to "voluntarily resign from Empire in ex-

change for certain benefits." J.A. at 141. These "certain benefits" included life insurance coverage, on substantially the same terms as provided in Empire's earlier plans. While the VSOP's description of health insurance benefits included an explicit reservation of Empire's right to adjust coverage, the description of life insurance benefits did not. In the "Administration" section of these materials, however, Empire "reserve[d] the right to amend and/or terminate the VSO Program at any time for any purpose." J.A. at 145. This section also warned that "Empire may or may not adopt new or modified programs or benefits or take other actions in the future that, depending on your individual circumstances, may be more or less advantageous to you than the current Program." Id.

In 1993, Empire offered the VIP, another early retirement incentive program similar to the VSOP. VIP documents informed employees that "[y]our insurance benefits may be extended to you for your lifetime . . ., depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify or if you would qualify *by adding five years to your age and five years to your service under the VIP*." J.A. at 167. The VIP provided for life insurance benefits virtually identical to those described in earlier plans; that is, benefits reduced by 10% on retirement and for four subsequent years, until reaching one's annual salary. Like the VSOP materials, the VIP's healthcare insurance description contained a reservation of rights, but the description of life insurance benefits did not. The VIP's Administration section included the following language:

> Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, up to the date on which that employee's Resignation and General Release and Covenant Not to Sue be-

> comes effective. Empire also reserves the right to announce new and different plans and programs as business needs require.

J.A. at 170.

The "Separation Agreement and General Release" entered into by certain appellants provided that "Empire reserves the right to change or eliminate, at any time, these retiree medical and life insurance benefits." J.A. at 181. It further provided that "[t]his separation agreement and release constitutes the sole and complete understanding between the parties." J.A. at 182.

Three of the normal retirees[3] received a letter upon retirement which described the retirement life insurance benefits:

> The life insurance that you have under our group program . . . will also be continued. You are presently insured for [two times your annual salary at retirement]. This amount will be reduced by 10% on your retirement date, . . . and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement, until it reaches [your annual salary] where it will remain constant (subject to the disclaimer below).

J.A. at 183-84. The disclaimer stated that "Empire retains sole discretion to modify or terminate each of the benefits described above at anytime." J.A. at 184.

On June 24, 1998, Empire distributed a letter which informed retirees that "the Board of Directors voted to adopt a

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[3] These individuals are Jack Brook, James Photis, and Henry Reynolds.

number of new benefit provisions for current employees, retirees and long-term disabled, that will go into effect January 1, 1999." J.A. at 57. These new provisions were necessary, the letter explained, for Empire to "distinguish itself in the complex world of health care" and to "bring Empire into line with [its] business competitors." J.A. at 57. The letter attached a summary of benefits changes, which announced that "[l]ife insurance will be provided at a flat $7,500" for those retirees who retired between January 1, 1989 and prior to June 23, 1998. J.A. at 58.

Several appellants wrote to Empire, expressing their discontent with these changes and demanding an explanation. In response, Empire explained that the costs of maintaining retiree benefits at their previous levels had become prohibitive. J.A. at 69. Additionally, in response to some of the other retirees' letters, Empire cited to the reservation of rights clause included in "Your Handbook." J.A. at 82-83.

Plaintiffs filed their complaint in April 1999 in the Southern District of New York. Their amended complaint alleged seven claims challenging Empire's reduction in life insurance benefits for these retirees. The first two claims sought to enforce the terms of the life insurance plan and to recover benefits due under the plan's terms under ERISA § 502(a)(1) , 29 U.S.C. § 1132(a)(1). The third, fourth, and seventh claims contended that Empire breached its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Appellants' fifth claim contended that Empire was barred from reducing their life insurance benefits by the doctrine of promissory estoppel. Finally, appellants asserted a claim for penalties under ERISA § 502(c)(1), 29 U.S.C. § 1132(c)(1), due to Empire's alleged failure to provide timely plan information upon request.

The parties filed cross-motions for summary judgment. On October 24, 2000, the district court issued its opinion and order denying plaintiffs' motion and granting summary

judgment to Empire. *Abbruscato v. Empire Blue Cross and Blue Shield*, No. 99 CIV. 2970 (BSJ), 2000 WL 1585084, at *7 (S.D.N.Y. Oct. 24, 2000). The district court rejected plaintiffs' reliance on "informal communications" as evidence of their contractual vesting claim, and concluded that the relevant plan documents, including the 1987 SPD as well as the VSOP and VIP documents, clearly informed plaintiffs that Empire could modify or terminate the benefits. *Id.* at *2*5 The district court rejected plaintiffs' breach of fiduciary duty and penalty claims by reference to its discussion in *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV. 8520 (BSJ), 2000 WL 1538605, at *9-*10 (S.D.N.Y. Oct. 18, 2000). *Abbruscato*, 2000 WL 1585084, at *6. With respect to plaintiffs' promissory estoppel claim, the district court concluded that plaintiffs failed to demonstrate either the basic elements of promissory estoppel or that there were "extraordinary circumstances," as required in ERISA cases. *Id.* at *6-*7.

We review the grant of a summary judgment motion de novo, and "reversal is required if there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 77 (2d Cir. 1996) (citations and internal quotation marks omitted)

This appeal followed, and oral argument was heard in tandem with *Kunkel*.

II. DISCUSSION

Appellants contend that Empire contractually promised to vest life insurance benefits through the relevant plan documents, retirement letters, Empire's position in an unemployment administrative proceeding, and informal communications. Appellants also assert a claim under the doctrine of promissory estoppel. Finally, appellants contend, as an alternative to their contractual vesting claim, Empire breached its

fiduciary duties under ERISA by making misleading statements concerning the retirees' life insurance benefits.[4]

A. Contractual Vesting

Because the essence of the appellants' contractual vesting claim is identical to that asserted in *Kunkel*, we repeat below the standards set forth in that case:

> Plaintiffs claim under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), which permits a civil action by a plan participant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." Essentially, plaintiffs assert under this section a "contractual right under a benefit plan." *Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999).
>
> "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *also Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (stating the general rule that under ERISA an employer welfare plan is not vested and that an employer has the right to terminate

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[4] Appellants do not assert on appeal their claim for penalties under ERISA § 502(c)(1).

> or unilaterally amend the plan at any time).[5] "[I]f a [plan] document unambiguously indicates whether retiree benefits are vested, the unambiguous language should be enforced." *Am. Fed'n of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (*"Multifoods"*). Thus, even though Empire is "generally free" to modify its life insurance plan, if Empire promised vested benefits, those benefits will be enforced.

Kunkel, F.3d at ___, slip op. at [10-11]. In this Circuit, to avoid summary judgment on an ERISA contractual vesting claim, plaintiffs need only identify "specific written language that is reasonably susceptible to interpretation as a promise." *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999)

These appellants, unlike those in *Kunkel*, do not urge us to review the pre-1987 SPDs issued by Empire in search of this language. Instead, these appellants contend that the 1987 SPD contained in "Your Handbook," the VSOP and VIP documents, retirement letters, and Empire's representations in the context of unemployment benefits proceedings in New York state courts all demonstrate that Empire promised to vest life insurance benefits at the level stated upon retirement.

1. The VSOP and VIP Retirees

Appellants quote the VSOP and VIP language at length in support of their contractual vesting claim, emphasizing that both programs' materials include a reservation of rights clause within its health insurance description but *not* within

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[5] The parties do not dispute that life insurance benefits are such "welfare benefits" under ERISA. *See* 29 U.S.C. § 1002(1).

its life insurance description. Additionally, both documents describe life insurance benefits as a "lifetime" benefit. The VSOP description states: "If you have at least 5 years of vested service in the pension plan and your age plus completed years of service . . . equal *65 or more*, you are eligible for lifetime health insurance and life insurance coverage . . . J.A. at 142. The VIP description states: "Your insurance benefits may be extended to you for your lifetime *or* may be provided for an additional six months, depending on your age and years of service. You will be eligible for retiree insurance benefits if you normally qualify *or* if you would qualify *by adding five years to your age and five years to your service under the VIP*." J.A. at 167. We believe that both statements are reasonably capable of being interpreted to provide a vested lifetime life insurance benefit at the level described in the materials, so long as the VSOP or VIP retiree met the age and years of service qualifications.

The district court concluded that both the VSOP and the VIP materials contained a reservation of rights clause which effectively prevented any life insurance coverage from vesting. *Abbruscato*, 2000 WL 1585084, at *3-*4. We disagree. The VSOP provides that Empire "reserves the right to amend and/or terminate the VSO *Program* at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time." J.A. at 145 (emphasis added). We do not believe that this statement *unambiguously* reserves Empire's right to reduce the life insurance benefits provided by the VSOP. Instead, this language is capable of being interpreted to mean that Empire merely reserved the right to change the *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms.

The VIP document's purported reservation of rights is even less compelling. That document states: "Empire reserves the right to amend and/or withdraw the VIP at any time for any purpose with respect to any employee, *up to the date on which that employee's Resignation and General Release and Covenant Not to Sue* becomes effective. Empire also reserves the right to announce new and different plans and programs as business needs require." J.A. at 170 (emphasis added). By its own terms, Empire's purported right to amend the VIP expired for these retirees. Further, Empire's ability to announce new and different plans in the future does not affect the terms under which these appellants retired.

Because the statements in the VSOP and VIP describing the lifetime benefits are susceptible to interpretation as a promise of vested benefits, and because neither the VSOP nor the VIP contain unambiguous reservation of rights clauses, we vacate the district court's grant of summary judgment to Empire and remand for further proceedings. Additionally, because we conclude that the VSOP and VIP documents are ambiguous, we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions. *See Kunkel*, F.3d at ___, slip op. at (16-17] (citing *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir. 1993) (en banc) (Posner, J.)

2. The Normal Retirees

In contrast to the VIP and VSOP documents, we conclude that the 1987 SPD does not contain any ambiguity. Those appellants who retired in normal course claim that their life insurance vested pursuant to language included in the 1987 SPD, which provided that their life insurance in the amount of their annual salary at retirement "remains in force for the rest of [their] li[ves] , at no cost to [them] ." J.A. at 342. As noted above, however, the *same* SPD (albeit in a different section of the SPD) included a reservation of rights

clause, which stated: "The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if necessary. *The company also reserves its right to amend each of the Plans at any time.*" J.A. at 352 (emphasis added). Additionally, the introduction to the handbook containing the life insurance plan provided that Empire "expect[s] to continue the policies and benefits described here; but, [it] might someday have to change some of them or introduce new ones." J.A. at 339.

The district court concluded that, because "Empire . . . expressly reserved the right to amend or terminate the benefit program . . . [it] never expressed an intention to vest the life insurance benefits in the plaintiffs." *Abbruscato*, 2000 WL 1585085, at *5 With respect to the retirees who base their contractual vesting claim on the 1987 SPD contained in "Your Handbook," we agree with this conclusion. *Cf. Moore v. Met. Life Ins. Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (emphasizing that, under ERISA, "[a]utomatic vesting does not occur in the case of welfare plans," and rejecting a contractual vesting claim where the employer "clearly reserved in the plan documents and in the SPDs the right to amend or terminate the plans at issue")

In so concluding we decide the question left open by our decision in *American Federation of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 982-83 (2d Cir. 1997) ("*Multifoods*"). In *Multifoods*, we noted that we were "not faced with the question of how a document should be interpreted when it includes a general statement that all the benefits provided under the plan could be amended or terminated but also includes specific terms which could reasonably be interpreted as promising vested retiree benefits." *Id.* Because we ultimately concluded in *Multifoods* that the relevant SPD could not "reasonably be interpreted as promising vested benefits," we declined to resolve the issue. *Id.* at 982.

In *Joyce*, we came closer to resolving the question. In *Joyce*, the relevant SPD provided: "During your retirement, you and your covered dependents will have the same. coverage as you had while active at no cost to you." *Joyce*, 171 F.3d at 136. The SPD also contained a reservation of rights clause that "explicitly mention[ed] that the company 'reserves the right to end or amend'" the benefits coverage offered. *Id.* Additionally, the employer had distributed summary annual reports which informed employees that coverage would terminate should their Collective Bargaining Agreement terminate. *Id.* at 132. We concluded:

> Although we have not joined those circuits that have adopted the position that "a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually," we believe that the SPD's reservation of rights clause, when combined with the termination language of the [summary annual reports] , precludes any viable claim that the SPD served to vest the retirees' benefits.

Id. at 136 (quoting *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998)).[6]

Here, unlike in *Multifoods* or in *Joyce*, we have SPD language that *both* appears to promise lifetime life insurance coverage at a particular level *and* clearly reserves Empire's right to amend or terminate such coverage. Because the

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[6] Additionally, in *Devlin v. Transportation Communications International Union*, we affirmed the district court's conclusion that "'Plaintiffs' claim to vested welfare benefits is contradicted by the union's unambiguous reservation in the Plan documents of its right to amend the Plan.'" 173 F.3d 94, 103 (2d Cir. 1999) (quoting the district court opinion).

same document that potentially provided the "lifetime" benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits.

The Sixth Circuit has similarly concluded, where a group of General Motors retirees challenged a reduction in health coverage, that the relevant SPD provided that lifetime health coverage would be provided at no cost. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (en banc) The same SPD also provided that "General Motors Corporation reserves the right to amend, change or terminate the Plans and Programs described in this booklet." The Sixth Circuit reasoned:

> We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change. . . . As the Third Circuit explained in a similar case, "'the promise made to retirees was a qualified one: the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided.'"

Id. (quoting *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 904 n.12 (3d Cir. 1995)).

In adopting this approach, we emphasize that our holding today is limited to those situations where the *same* document contains both the promise and the reservation of rights. In this vein, we distinguish the argument here from that in *Kunkel*, where one SPD promised lifetime benefits but an SPD issued subsequently contained a reservation of rights

clause. *Kunkel*, F.3d at —, slip op. at [4-5]. In *Kunkel*, we concluded that the relevant provisions were only those contained in the earlier SPD, and that the reservation of rights clause contained in the later SPD was ineffective as to those retirees. *Id.* at , slip op. at (14-16]

We therefore affirm the district court's conclusion with respect to the contractual vesting claim based on the 1987 SPD.[7]

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[7] As described in our decision in *Kunkel*, ___ F.3d at slip op. at [4], Empire distributed summary plan descriptions prior to 1987. These earlier SPDs contained no reservation of rights clause. In *Kunkel*, we held that these SPDs included language that was reasonably capable of being interpreted as promising to vest life insurance benefits upon eligibility for retirement. *Id.* at ___, slip op. at [14-18].

Unlike the *Kunkel* plaintiffs, these appellants do not base their claim to life insurance benefits on the pre-1987 SPDs. Instead, these appellants contend that they are contractually entitled to the contested life insurance benefits under either the 1987 SPD, entitled "Your Handbook," the VSOP documents, or the VIP documents, depending on retirement circumstances. Additionally, they rely on letters from Empire and other informal communications concerning the life insurance benefits. Although we are acutely aware of the anomaly created by this differing litigation strategy, there does not appear to be a principled analysis which affords these appellants relief in this appeal based on the pre-1987 SPDs. Appellants apparently did not argue this theory below nor did they present it on appeal, although they did include reference to the pre-1987 SPDs in their amended complaint. Indeed, during oral argument, counsel expressly disavowed any reliance on the pre-1987 SPDs.

Because we are remanding appellants' cause to the district court, it is possible that these appellants may seek to amend their complaint to add such a theory. Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires." Because plaintiffs have alluded to these pre-1987 SPDs in their complaint and have generally alleged claims under ERISA § 502 (a) (1) to enforce the terms of the plan, it may be that the complaint "contains allegations that could support [such] a cause of action." *Manning v. Utilities Mut. Ins. Co.*, 254

[Footnote continued on next page]

B. Promissory Estoppel

In *Kunkel* we set forth the framework for a promissory estoppel claim under ERISA:

> "[P]rinciples of estoppel can apply in ERISA cases under extraordinary circumstances." *Schonholz*, 87 F.3d at 78. A plaintiff must satisfy four elements to succeed on a claim of promissory estoppel: "'(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.'" *Aramony v, United Way Replacement Benefit Plan*, 191 F.3d 140, 151 (2d Cir. 1999) (quoting *Schonholz*, 87 F.3d at 79) Additionally, "an ERISA plaintiff must 'adduce[] not only facts sufficient to support the four basic elements of promissory estoppel, but facts sufficient to [satisfy an] 'extraordinary circumstances' requirement as well.'" *Aramony*, 191 F.3d at 151 (quoting *Devlin v. Transp. Comms. Int'l Union*, 173 F.3d 94, 102 (2d Cir. 1999)). *Schonholz* provides an example of such extraordinary circumstances, where the employer used promised severance benefits to induce the plaintiff to retire. *Schonholz*, 87 F.3d at 79-80.

Kunkel, ___ F.3d at ___, slip op. at [18-19].

[Footnote continued from previous page]
F.3d 387, 402 (2d Cir. 2001) (although affirming the dismissal of one type of claim, concluding that plaintiff should be allowed to replead to "allege more sufficiently" a different but related claim). We express no view as to whether the interests of justice favor allowing plaintiffs to amend to allege this theory specifically.

This claim is viable only with respect to those former employees who retired pursuant to either the VSOP or VIP. They contend that Empire intentionally induced them into taking early retirement and foregoing future years of salary and the opportunity to obtain other life insurance. Such intentional inducement, appellants argue, satisfies the "extraordinary circumstances" requirement set forth in *Schonholz*, 87 F.3d at 78-80. Empire contends that the VSOP and VIP documents cannot support a promissory estoppel claim, because given the reservation of rights clauses in these documents, plaintiffs cannot demonstrate that Empire promised lifetime life insurance benefits at a particular level. Empire further contends that appellants have failed to establish any "extraordinary circumstances."

We agree with appellants and therefore remand this claim to the district court. These appellants have sufficiently demonstrated the four basic elements of promissory estoppel plus "extraordinary circumstances" to avoid summary judgment. As described above, appellants have identified language in the VSOP and VIP documents that can reasonably be interpreted as a promise. Appellants have demonstrated reliance by retiring early based, in part, on this promise. Without question, the reduction in life insurance benefits injures these appellants. Finally, appellants have adequately demonstrated (assuming a fact finder concludes a promise was made) that an injustice will result should Empire's promise not be enforced.

Additionally, appellants have alleged sufficiently extraordinary circumstances surrounding these early retirement programs. As these documents state, Empire offered these early retirement incentive programs "as a financial incentive to those employees who voluntarily decide to resign or retire from Empire" because Empire "need[ed] to reduce [its] overall expenses." J.A. at 147 (VSOP), 171 (VIP). From these statements, it is reasonable to conclude that Empire used the

VSOP and VIP as an inducement to persuade appellants to retire; if a trier of fact were to so conclude, this would suffice as an extraordinary circumstance. *Devlin*, 173 F.3d at 102 ("[T]he remarkable consideration in *Schonholz* was the defendants' use of promised severance benefits as an inducement to persuade Schonholz to retire."). The reasoning of *Schonholz* supports our conclusion:

> If [defendant] had not transmitted the . . . letter [which promised severance benefits], Schonholz might never have submitted her resignation. [Defendant] then would have had to choose between firing Schonholz and keeping her on for an undetermined period. Each option presumably entailed disadvantages . . . because [defendant] chose neither. For instance, firing Schonholz might have affected employee morale . . . In other words, by agreeing to leave amicably, Schonholz conferred a benefit on [defendant] , one that may be quantifiable.

Schonholz, 87 F.3d at 79-80. By accepting the VSOP or VIP offer, appellants likewise have presumably conferred a benefit on Empire, and prevented it from having to resort to salary reductions, layoffs or firings during those years. A trier of fact could reasonably find that Empire intentionally induced appellants to accept the offer to retire in order to avoid having to take these less desirable steps. Because of these disputed issues of fact, summary judgment was inappropriate. We must therefore remand this claim to the district court.

C. Breach of Fiduciary Duty

Appellants contend on appeal that, in the alternative to their contractual vesting claim, Empire breached its fiduciary duty by repeatedly providing misleading information about "lifetime" life insurance benefits at a particular level. ERISA § 404(a)(1) outlines fiduciary duties:

> a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-. . . (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

29 U.S.C. § 1104(a). We have restated this statutory requirement: "A fiduciary must discharge his duties 'solely in the interests of the participants and beneficiaries.' He must do this 'for the exclusive purpose' of providing benefits to them. And he must comply 'with the care, skill, prudence, and diligence under the circumstances then prevailing' of the traditional 'prudent man.'" *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (Friendly, J.) (quoting ERISA §§ 404(a)(1)(A) &(B)). An employer has "a duty to deal fairly and honestly with its beneficiaries." *Ballone v. Eastman Kodak Co.*, 109 F.3d 117, 124 (2d Cir. 1997).

Empire asserts here, as it did in *Kunkel*, that appellants cannot maintain this claim because "there is no private action for breach of fiduciary duty under ERISA when another remedy is available under 29 U.S.C. § 1132." Appellee's Br. at 32. In today's decision in *Kunkel*, we rejected this assertion and concluded that the Supreme Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 515-16 (1996), contrary to Empire's assertion, "did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited

to such equitable relief as is considered appropriate." *Kunkel*, ___ F.3d at ___, slip op. at [28]

Empire also repeats here its argument that it was not acting in a fiduciary capacity, and therefore cannot be liable under this section. We rejected that contention in *Kunkel*, F.3d at , slip op. at [24]. We adopt *Kunkel's* holding that "Empire may have been acting as a fiduciary when it communicated with its employees and retirees concerning the contents of the welfare benefits plan." Id. (citing *Varity Corp.*, 516 U.S. at 502-03; *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 84 (2d Cir. 2001); and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998)).

As in *Kunkel*, we conclude here that there are genuine issues of material fact to be resolved by a trier of fact regarding this claim. In this vein, we repeat our analysis in *Kunkel*:

> In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time. "[W]hen a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." *In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1264 (3d Cir. 1995) (concluding that Unisys had breached

> its fiduciary duty where it "affirmatively and systematically represented to its employees that once they retired, their medical benefits would continue for life—even though as the district court concluded in rejecting the retirees' contract claim, the plans clearly permitted the company to terminate benefits"); *cf. Becher v. Long Island Lighting Co.* (*In re Long Island Lighting Co.*), 129 F.3d 268, 271 (2d Cir. 1997) ("An ERISA fiduciary has an obligation to provide full and accurate information to the plan beneficiaries regarding the administration of the plan.")

Kunkel, F.3d at , slip op. at [25-26]. We therefore remand this claim to the district court to "permit a trier of fact to evaluate Empire's communications with [appellants] for affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire has breached it." *Id.* at , slip op. at [26]

III. CONCLUSION

For the reasons stated above, we affirm the district court's grant of summary judgment only with respect to the contractual vesting claim based on the 1987 SPD. As to the contractual vesting and promissory estoppel claims based on the VSOP and VIP, we vacate and remand to the district court for further proceedings. Finally, we likewise vacate and remand the breach of fiduciary duty claims.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN F. BYRNES, WILLIAM A DE MAURO, FRANCIS J. DEVLIN, MICHAEL ELKINS, JERROLD I. ERLICH, BEVERLY GLICKERMAN, EUGENE F. HARRISON, GERALD HARRISON, RICHARD G. KUNKEL, JOHN F. LUCZUN, JOHN F. MULDOON, JOSEPH G. MURPHY, HARRY E. NICHOLSON, DANIEL ROSENBERG, DANIEL G. SANDERS, JAMES C. SNYDER, ANTHONY J. TRUHON, JOHN WANDZILAK JR., RONALD D. ZAMMIT, ELLEN PROPP, LOUIS LEVINE, JOHN SHURTLEFF, JULES LAMBEK, and STERLING CATHEY,

Plaintiffs,

v.

EMPIRE BLUE CROSS AND BLUE SHIELD,

Defendant.

98 Civ. 8520 (BSJ)

OPINION
&
ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Introduction

This is an action pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, brought by twenty-four former employees who retired from defendant Empire Blue Cross and Blue Shield ("Empire") between 1989 and 1993. Plaintiffs seek to enforce the terms of a life insurance plan provided by Empire to its retiring employees as those terms existed before 1998, when Empire significantly lowered the amount of its life insurance benefit to retirees. Plaintiffs seek injunctive and declaratory relief under §§ 502(a)(1) and 502(a)(3) of ERISA to enforce their

rights under the life insurance plan and to clarify their entitlement to future benefits, and monetary relief under § 502(a)(1) for Empire's wrongful reduction of their benefits; under §§ 404(a)(1)(A), (B) and (D) and for breaches of fiduciary duty, and under § 502(a)(1)(A) for failure to timely provide benefits information summaries to the plaintiffs. Plaintiffs have also asserted a claim of promissory estoppel. Plaintiffs now move for summary judgment pursuant to Fed. R. Civ. P. 56; defendants oppose and cross-move for summary judgment.

Background

The following facts are undisputed or as alleged by plaintiffs. Plaintiffs were all employed with defendant Empire at various times and for various lengths of time from as early as the 1940s to as late as 1993. All are now retired and are eligible participants in Empire's group life insurance plan. Throughout plaintiffs' employment with Empire, Empire maintained at no cost to its employees a group life insurance plan which provided for a certain amount of retiree life insurance benefits for eligible retirees, based on their salary. The plan provided for a base life insurance benefit of twice the employee's basic rate of annual salary while the employees remained employed with Empire. Upon retirement the level of the life insurance benefit would decrease by 10% and would decrease by that same amount on the next four anniversaries of the retirement date, so that four years after retiring, the life insurance benefit would have decreased by 50% and would therefore be equal to the employee's basic rate of annual salary. The plan provided that the amount of that benefit would then remain constant for the retiree's lifetime.

The retiree life insurance benefit plan was described in various employee handbooks distributed to employees throughout the years and in exit letters and severance package documents received by retirees at the time of their retirement from Empire. Plaintiffs allege that in each descrip-

tion of the plan, Empire announced its intention that the level of benefits would remain constant for the retiree's lifetime. Numerous oral representations by Empire management reaffirmed the employees' understanding of their entitlement to a constant amount of life insurance benefits for the rest of their lives. Plaintiffs allege that they relied on Empire's above-average benefits packages to counterbalance their below-average salaries.

In the summer of 1987, before any plaintiffs retired, Empire prepared an employee handbook entitled "Your Handbook." The extent to which that handbook was circulated to Empire's employees is contested; many plaintiffs dispute ever having seen or received Your Handbook. It is undisputed, however, that Your Handbook contained a Summary Plan Description ("SPD") of Empire's group life insurance plan, which for the first time explicitly reserved Empire's, right to modify, reduce or eliminate the retiree life insurance benefits under the plan. The portion of the SPD describing the life insurance benefit reads:

> your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage remains in force for the rest of your life, at no cost to you.

(Exh. 6 to Becker Aff., p. 36.) Six pages later, on the bottom of page 42, Your Handbook notes "[o]ther important information about your Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration. *Id.* at 42. In the Benefit Administration section, under the subheading "Plan Termination Provisions," Your Handbook notes:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits of its em-

> ployees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to amend each of the Plans at any time.

Id. at 68.

In July 1998, pursuant to a decision by Empire's board of directors, and after all of the plaintiffs had retired, Empire reduced its retiree life insurance benefit to $7500 for all employees retiring after January 1, 1989). All of the plaintiffs had retired after that cut-off date. Some of the plaintiffs subsequently wrote Empire in protest and received letters from Empire management which justified the benefit reduction by citing the reservation of rights language from Your Handbook. Many of the plaintiffs have had difficulty securing replacement life insurance coverage in the wake of Empire's decision to reduce their benefits.

Plaintiffs filed this action in December of 1998, alleging that Empire had wrongly deprived them of contractually vested retirement welfare benefits in violation of ERISA, and had breached its fiduciary duties by providing misleading information to the plaintiffs before it reduced the life insurance benefits and by providing insufficient information or justification to the plaintiffs after the benefit reduction. Plaintiffs have also claimed that Empire is estopped from denying life insurance benefits that it allegedly promised to them.

Summary Judgment Standard

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Callo v. Prudential Residential Servs.*,

Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Corp.*, 369 U.S. 654, 655 (1962)). Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Nonetheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

I.

There are two distinct types of employee benefit plans under ERISA: pension plans and welfare plans. *See* 29 U.S.C. §§ 1002(1) & (2)(A). Because Empire's plan involves life insurance, it is classified as a welfare plan. *See* § 1002(1).

"Unlike pension pan benefits, the benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time." *American Fed'n of Grain Millers, AFL-ClO v. International Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) (citations omitted) The reason for this rule is that "'the costs of such plans are subject to fluctuating and unpredictable variables.'" *Id.* (quoting *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)). Because the same may be said for welfare plans that provide benefits to retirees, "retiree welfare benefits are generally not vested, and an employer can amend or terminate a plan providing such benefits at any time." *Id.*

Although there is no automatic vesting of benefits under an ERISA welfare plan, "if an employer promises vested benefits, that promise will be enforced." *Id.* at 980 (citations omitted). However, a commitment to vest welfare benefits "is not to be inferred lightly." *See Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.), *cert. denied*, 524 U.S. 923 (1998).

Plaintiffs claim that Empire, through its communications with them describing benefits that would last "for the remainder of their lives" made a contractual promise which the plaintiffs relied on and which vested in the plaintiffs the right to a constant amount of life insurance for the remainder of their lives. Plaintiffs claim that Empire breached that promise and violated ERISA when it reduced their life insurance benefit to $7500.

To determine whether Empire promised vested benefits to the plaintiffs, the Court looks to the relevant ERISA plan documents. *See Joyce v. Curtiss-Wright Corp.*, 172 F.3d 130, 133 (2d Cir. 1999). The scope of a welfare benefits plan is defined by the official plan documents and the summary plan descriptions. *See Moore*, 856 F.2d at 489 ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans."). The courts of this Circuit agree that if a plan document or SPD unambiguously indicates whether retiree benefits are vested, the unambiguous language should be enforced. *American Fed'n of Grain Millers*, 116 F.3d at 980. Therefore the Court looks to the plan documents and SPDs disseminated by Empire to the plaintiffs to discern whether those documents demonstrate Empire's intent to vest retirement life insurance benefits in these plaintiffs.

The only master plan document generated prior to 1987 which was submitted into evidence is the 1979 life insurance policy between New York Life Insurance Co. and Blue Cross

and Blue Shield Of Greater New York, Empire's predecessor entity. The policy defines "Life Insurance" as

> An amount equal to 200% of the employee's basic rate of annual salary, excluding overtime and bonuses, taken to the next higher multiple of $1,000, if not already an exact multiple thereof. In no event shall such amount exceed $600,000. On the earlier of (a) the day the employee retires, or (b) the day the employee attains age 65, the amount of his Life Insurance will be reduced by 10% and by an equal amount on each of the next four anniversaries of the initial reduction.

(Ex. 1 to Becker Aff., p. 3.)

There is no language in this document explicitly providing that the life insurance benefit described in the policy calculation will remain at that level for the remainder of the employee's life. Indeed, the policy specifically provides that

> an employee's insurance will terminate upon the occurrence of the first of the following events: . . .
>
> (2) modification of the policy to terminate insurance on the class of employees to which he belongs; or (3) termination of the policy.

Id. at 2. This plan document reserves Empire's right to terminate life insurance benefits as to a class of or all of its employees, and therefore constitutes evidence of Empire's intent not to vest insurance benefits in its retirees.

However, an employer's intention to vest welfare benefits in its employees can be divined from sources other than the formal plan documents. *See Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76 (2d Cir. 1996); *Moore*, 856 F.2d at 490. Employers are also bound by promises made in

summary plan descriptions, or SPDs, which Congress intended to be a primary source of information regarding health benefits. *See* 29 U.S.C. § 1022; *Joyce*, 171 F.3d at 135-36. Therefore the fact that the 1979 insurance contract contains a reservation of Empire's rights to terminate the policy does not resolve the question as to whether these benefits had vested in the plaintiffs, because where the terms of a plan document and those of an SPD conflict, it is the SPD that controls. *See Grain Millers*, 116 F.3d at 982 (citing *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990)).

The parties dispute which SPD governs the plaintiffs' rights. Plaintiffs argue that the SPDs contained in employment handbooks and distributed to employees by Empire throughout the years preceding 1987 govern their rights. Plaintiffs cite a handbook distributed some time in the 1970s which provides:

> For eligible retirees; the group life insurance will be reduced 10% on the retirement date and in equal amounts on the next four anniversaries of the retirement date. That is, on the fourth anniversary of the employee's retirement, benefits will have been reduce [sic] 50% of the pre-retirement level *for the remainder of their lives*.

(Pl. Ex. A.) (emphasis added) They also cite another handbook distributed in the 1980s which provides:

> That is, on the fourth anniversary after the employee's birthday or retirement, benefits will have been reduced 50% of the pre-65 pre-retirement level and will remain at that level *for the remainder of their lives*.

(Pl. Ex. B.) (emphasis added).

Plaintiffs read these SPD provisions as a contractual promise by Empire to vest the described amount of life insur-

ance in them. Empire reads these provisions only as descriptions of the life insurance benefits existing at that time, not as a promise that those benefits would remain at any particular level forever. More significantly, however, Empire argues that the 1987 Your Handbook, which reserved the company's right to amend the plan at any time, superseded these prior employee handbooks, and that it is the relevant summary plan description governing the plaintiffs' rights.

Empire's argument that the 1987 Your Handbook SPD governs the plaintiffs' rights is founded on the argument that the plaintiffs' retiree life insurance benefits, if they vest at all, vest only upon the plaintiffs' retirement Consequently, Empire argues that because these employees had not yet retired when Empire expressed in Your Handbook in 1987 that benefits were not vested, Empire could modify or terminate the life insurance benefit at any time thereafter without violating any contractual promise to these plaintiffs.

The question for the Court then is whether the early SPDs cited by the plaintiffs express an intent to contractually vest retiree life insurance benefits in the plaintiffs *before they retired*, so that Empire could not subsequently divest those benefits by reserving their right to amend the life insurance benefit program in the 1987 Your Handbook.

ERISA plan contracts are construed according to federal common law. *See Masella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98, 107 (2d Cir. 1991); *Katz v. Colonial Life Ins. Co. of America*, 951 F. Supp. 36, 40 (S.D.N.Y. 1997). The federal common law governing ERISA "embodies common-sense canons of contract interpretation." *Brooke v. Home Life Ins. Co.*, 864 F. Supp. 296, 299 (D. Conn. 1994). Thus, "straightforward language in an ERISA policy must be given its natural meaning." *Fischman v. Blue Cross & Blue Shield of Conn., Inc.*, 775 F. Supp. 513, 515 (D. Conn. 1991) (citation omitted). A court must consider contractual language within the context of the entire agreement,

rather than focus on a particular term *See U.S. Fire Ins. Co. v. General Reins. Corp.*, 949 F.2d 569, 571-72 (2d Cir. 1991); *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). "Nor may an ambiguity be found where the contract has a definite meaning, and where no reasonable basis exists for a difference of opinion about that meaning." *Brass v. American Film Techs., Inc.*, 987 F.2d 142, 149 (2d Cir. 1993). Contract language is only ambiguous "if, when considered objectively from the viewpoint of a 'reasonably intelligent person' it is subject to more than one meaning." *Katz*, 951 F. Supp. at 40 (quoting *Sayers v. Rochester Tel. Corp. Suppl. Mgmt. Pension Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993)).

The Court finds that the pre-1987 Summary Plan Descriptions cited by the plaintiffs do not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired. Without clear and express language to the contrary, it was only reasonable for the plaintiffs to believe that if they retired *while those SPDs were in effect* that they would be entitled to the rights described therein. In other words, it is upon retirement, and not before, that plaintiffs' entitlement to the benefits would have vested.

Analogous case law supports our reading. In *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993), as in this case, the defendant employer had issued several SPDs that did not contain reservation of rights provisions. *See id.* at 932-33. Once this oversight had been discovered, the employer issued an SPD that reserved its right to terminate benefits. It then announced that it would eliminate retiree benefits offered to current employees who retired after a certain date. There was never a dispute over whether the employer could change the benefits it offered to those who had already retired. The company agreed that the benefits for those employees who had retired before the new SPD was issued had already

vested *upon their retirement* based upon the language of prior SPDs. The court then wrote as to the employees who had not yet retired when the reservation of rights language went into effect

> El Paso's statement in the pre-1985 SPDs that "[u]pon retirement, you . . . are automatically insured for retirement health care benefits and the Company pays the entire cost" discussed what the Plan then provided, not whether it would be offered in perpetuity. *As to yet-unretired workers, no commitments were made.*

Wise, 986 F.2d at 937-38 (emphasis added)

Similarly, Empire made certain promises to its employees in summary plan descriptions without reserving its right to terminate those benefits after retirement. But those SPDs only described the insurance benefits which were then available to retirees, and did not express any intention to offer them in perpetuity. The plaintiffs in this case had not yet retired when Empire expressly reserved the right to alter or terminate the life insurance benefit, and so any rights the plaintiffs might have had to retiree life insurance benefits as described in pre-1987 employee handbooks had not yet vested. *See id.* at 936 ("[t]he instant plaintiffs are asking us to do what neither Congress nor any other court has ever done—impose vesting for employees who had not yet retired as of the date of the disputed change."); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996) ("it was reasonable for the plaintiff employees . . . to believe that if they retired *while the . . . SPDs were in effect*, they would be entitled to the specified health benefits") (emphasis added); *Tusting v. Bay View Fed. Sav. & Loan Assoc.*, 789 F. Supp. 1034, 1043 (N.D. Cal. 1992) ("[p]laintiffs' argument that they acquired a right to vested retirement benefits prior to retirement . . . cannot be sustained."). Plaintiffs in their

memorandum of law supporting the motion for summary judgment even cite a case which illustrates this proposition, *Algie v. RCA Global Communications, Inc.*, wherein the court wrote:

> *once a triggering event occurs that entitles the employee to a specified benefit*, the employer is contractually and statutorily obligated to provide that benefit and may not retrospectively amend the plan to divest the plan participant of a payment that he was already entitled to receive.

891 F. Supp. 875, 884 (S.D.N.Y. 1994) (emphasis added). In this case the triggering event that would have entitled the plaintiffs to the benefits described in the pre-1987 SPDs was retirement before 1987's Your Handbook was distributed.

Accordingly, plaintiffs' rights are governed by the SPD which was in place when they actually retired. For plaintiffs Byrnes, DeMauro, Devlin, Ehrlich, Glickerman, Eugene Harrison, Gerald Harrison, Levine, Luczun, Rosenberg, Sanders, Shurtleff, Snyder and Truhon, who retired in the regular course of business, the relevant SPD is Your Handbook, which contains the same "for the remainder of your life" language that the plaintiffs contend represents a contractual promise by Empire to vest the benefits in them, but also contains language expressly reserving Empire's right to amend or terminate the life insurance benefit. Plaintiffs Cathey, Kunkel, Muldon, Murphy, Nicholson, Propp and Wandzilak did not retire in the regular course of business but instead accepted an early retirement offer from Empire known as the Voluntary Separation Opportunity Program ("VSOP"). The VSOP plan description describing their benefits also contains an explicit reservation of rights clause, which provides

> The Corporation reserves the right to amend and/or terminate the VSO Program at any time for any purpose. The Corporation also re-

> serves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time.

(Ex. 7 to Becker Aff.)

Plaintiffs Elkins, Lambek and Zammit also accepted an offer of early retirement from Empire known as the Voluntary Incentive Program ("VIP"). The documents describing the benefits for program participants also include an express reservation of rights clause, which provides "Empire also reserves the right to announce new and different plans and programs as business needs require." (Ex. 8 to Becker Aff.)

Plaintiffs have not argued that under these SPDs they are entitled to vested benefits, because they contend that the earlier SPDs govern their rights. However, contrary to plaintiffs' arguments, the pre-1987 SPDs do not govern their rights. Instead, each plaintiff's right to life insurance benefits is governed by an SPD that expressly notifies the plaintiffs of Empire's right to change any of the benefits it offers at any time. Although the plaintiffs do not appear to argue that they are entitled to vested benefits under these SPDs, the Court will nonetheless discuss whether these SPDs provided them with vested life insurance benefits.

It is an open question in this Circuit whether a general amendment provision in a welfare benefits plan is sufficient in and of itself to supersede plan language promising vested benefits. *See Berg v. Empire Blue Cross & Blue Shield*, 105 F. Supp. 2d. 121, 128-29 (E.D.N.Y. 2000)

This Court finds that Empire's reservation of rights clauses contained in Your Handbook and the VSOP and VIP documents are sufficient to negate any language cited by plaintiffs as evidence of a promise of vested benefits to them. Although when viewed alone outside the context of the SPDs in which it is found, the "for the remainder of your lives"

language cited by the plaintiffs might reasonably be interpreted as vesting life insurance benefits in them, the Court must consider contractual language within the context of the entire agreement rather than focus on a particular term. *See U.S. Fire Ins. Co. v. General Reins. Corp.*, 949 F.2d 569, 571-72 (2d Cir. 1991); *Garza v. Marine Transport Lines, Inc.*, 861 F.2d 23, 27 (2d Cir. 1988). The SPDs governing plaintiffs' rights, in addition to containing a description of benefits for the remainder of plaintiffs' lives, also contain unambiguous language reserving Empire's right to amend or terminate the life insurance benefit. In *Devlin v. Transportation Communications Int'l Union*, 95 Civ. 0742 (JFK), 1997 WL 570512 at *5 (S.D.N.Y. Sept. 15, 1997), Judge Keenan granted summary judgment to the defendant employer on plaintiffs' claim that the employer violated a contractual promise of vested benefits when it amended its benefit plan. The employer changed the plan, which had previously provided that "contributions are not to be made by the employees," to require employees to make a monetary contribution to the plan. *See id.* at *2. Judge Keenan granted summary judgment based entirely on the defendant's unambiguous reservation of the right to modify the plan. The Second Circuit affirmed the grant of summary judgment to the defendant on plaintiffs' ERISA claims. *See Devlin v. Transportation Communications Int'l Union*, 173 F.3d 94, 103 (2d Cir. 1999).

In light of *Devlin* and of other Circuits that have held that a seemingly unambiguous promise of vested benefits for the remainder of retirees' lives is negated by an employer's inclusion in the same document of an express and unambiguous reservation of the right to amend or terminate the benefits, summary judgment for Empire is appropriate. *See, e.g., Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) ("we see no ambiguity in a [SPD] that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that

the terms of the current plan are subject to change."); *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, (3d Cir. 1995) ("the promise was that retiree medical benefits were for life provided the company chose not to terminate the plans, pursuant to clauses that preserved the company's right to terminate the plan under which those benefits are provided.").

Accordingly, pursuant to the unambiguous reservation of rights clause contained in Your Handbook and the VSOP and VIP documents, as well as the termination provisions contained in the 1979 insurance policy between New York Life and Empire, plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500.

This result is also sanctioned by ERISA policy. In *Moore*, the Second Circuit noted that Congress, by rejecting automatic vesting for ERISA welfare benefits, specifically recognized that employers required flexibility with respect to those plans because of fluctuating costs and business realities. *See* 856 F.2d at 492. Business realities relating to the rising costs and contingent liabilities of Empire's retiree life insurance benefit program are precisely the reasons Empire was forced to diminish the life insurance benefits at issue here. Empire's position is not unlike that of the defendant in *Wise*, where the court wrote:

> We are sensitive to Plaintiffs' earnest concerns and realize that today's decision works a significant hardship on workers who have invested, in many cases, most of their lives in service to the company. Across the nation, companies faced with rapidly rising costs and worried about their competitiveness are paring retiree benefits that were once considered sacrosanct. But ERISA simply does not grant employees unfettered rights to the corporate

> treasury. Employers need not abandon prudent business behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits.

Wise, 986 F.2d at 937.

This Court is also mindful that Empire's decision to reduce the plaintiffs' life insurance benefit works a hardship on them. However, Empire expressly reserved the right to amend or terminate the benefit program before any of the plaintiffs retired, and accordingly did not violate a contractual promise or ERISA when it exercised its reserved rights.

Plaintiffs' contentions that they did not receive or read Your Handbook[1] and therefore had no notice of Empire's newly stated reservation of rights do not change the result. An amendment to a welfare benefit plan is valid despite a beneficiary's lack of personal notice, unless the beneficiary can show active concealment of the amendment. *See Godwin v. Sun Life Assurance Co. of Canada*, 980 F.2d 323, 328 (5th Cir. 1992). In this case, even if the Court accepts as true that many of the plaintiffs had no actual notice of Empire's reservation of rights in the 1987 Your Handbook, record evidence submitted by Empire clearly demonstrates that it went to great lengths to ensure that all employees received Your Handbook, including asking employees to sign a sheet indicating receipt of the manual. Accordingly, Empire did not actively conceal its reservation of the right to amend or terminate the retiree life insurance program and plaintiffs' argument is rejected.

Furthermore, plaintiffs' appeal to extrinsic evidence in the form of exit letters to retiring employees and oral repre-

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[1] The plaintiffs that left Empire pursuant to the VSOP or VIP programs do not argue that they did not read or receive the plan documents.

sentations to employees while they were still working promising lifetime benefits is unavailing. Extrinsic evidence cannot be used to create an ambiguity which is not evident in the plan documents themselves. ERISA "bar[s] consideration of extrinsic evidence where a welfare benefit plan unambiguously reserves the plan administrator's right to amend and terminate the plan." *Moore*, 856 F.2d at 492 n.1.

Plaintiffs' motion for summary judgment on its claims to enforce the terms of the life insurance plan and for wrongful reduction of benefits under §§ S02(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3) is denied and defendant's cross motion for summary judgment on those claims is granted.

II.

Plaintiffs' claim that Empire breached its fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D). Plaintiffs' claim under § 404(a)(1)(D) is premised on Empire's reduction of life insurance benefits. Section 404(a)(1)(D) provides that a fiduciary must discharge its duties "in accordance with the documents and instruments governing the plan . . ." 29 U.S.C. § 1104(a)(1)(D). Plaintiffs claim that Empire violated the plan instruments when it reduced their life insurance benefits. As discussed above, Empire expressly reserved the right to amend the life insurance benefit in Your Handbook and the VSOP and VIP documents. Accordingly, Empire acted in accordance with the documents and instruments governing the plan in reducing plaintiffs' life insurance benefit, and plaintiffs therefore have no claim for breach of fiduciary duty against Empire based on Empire's amendment of the retiree life insurance benefit.[2] Plaintiffs' motion for

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[2] Furthermore, in order to prove a violation of ERISA § 404, a defendant must be a fiduciary of a benefit plan. *See Trustees Health and Welfare*

[Footnote continued on next page]

summary judgment on its claim of breach of Fiduciary Duty under ERISA § 404(a)(l)(D), 29 U.S.C. § 1104(a)(1)(D) is therefore denied, and defendant's cross-motion on that claim is granted.

Plaintiffs' fourth and seventh claims for relief for breach of fiduciary duties under §§ 404(a)(1)(A) and (B) are essentially founded on Empire's alleged dishonesty in making various representations to the plaintiffs that the retiree life insurance benefit would remain constant for the remainder of plaintiffs' lives. However, there is no indication in the record that Empire was dishonest or deceitful in its dealings with the plaintiffs. Empire included in its SPDS indications that it hoped and intended to continue to offer the plaintiffs the life insurance benefits that it had previously offered retirees, but

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[Footnote continued from previous page]
and Pension Funds of Four Joint Boards v. Schlesinger Bros. Inc., 931 F. Supp. 204, 207 (S.D.N.Y. 1996). However, when an employer or other plan sponsor, for any reason, adopts, modifies or terminates a welfare plan, it does not perform an administrative function and does not act as a fiduciary. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, (1995). "Virtually every circuit has agreed that because these defined [fiduciary] functions do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review." *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995).

Therefore, even if Empire "wore two hats" as plaintiffs allege and acted as both an employer and a plan administrator, it wore the hat of employer when it amended the retiree life insurance benefit and cannot be liable for breach of fiduciary duty for that act. Under ERISA the employer can "wear two hats," and for purposes of enacting an amendment regarding plan design it wears the hat of the employer, not the administrator. *See id.* at 506-07; *see also Devlin v. Transportation Communications Int'l Union*, No. 95 Civ. 0742 (JFK), 1997 WL 570512 at *7 (S.D.N.Y. Sept. 15, 1997) *overruled on other grounds*, 173 F.3d 94 (2d Cir. 1999) (holding that it is well-established that a company does not act in a fiduciary capacity when deciding to amend a welfare benefits plan).

that it may in the future have to amend or terminate the program. Empire was not required under ERISA to begin every communication with the plaintiffs by restating the caveat that it had reserved the right to change the life insurance plan. *See Sprague*, 133 F.3d at 405. Furthermore, there is no indication that the representations that plaintiffs cite as being dishonest did not sincerely represent the intentions of Empire at the time those representations were made. There is no fiduciary duty to disclose contemplated changes in benefits before those changes become official. *See Pocchia v. NYNEX Corp.*, 81 F.3d 275, 278 (2d Cir.) *cert. denied*, 519 U.S. 931 (1996). Accordingly, Empire did not describe its benefits to the plaintiffs in a way that was misleading or dishonest; rather it described the plan accurately by setting forth what it intended to continue to offer to retirees while expressly reserving the right to amend or terminate the benefits.

Accordingly, Empire did not breach its fiduciary duties to the plaintiffs when it communicated with them regarding the life insurance benefit plan. Plaintiffs' motion for summary judgment on its claims for breach of fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) is therefore denied; Empire's cross-motion on those claims is granted.

Plaintiffs also assert a claim for a violation of ERISA based on Empire's responses to letters of protest sent by the plaintiffs in the wake of Empire's reduction of the benefit. Plaintiffs claim that Empire violated § 104 of ERISA, 29 U.S.C. § 1024, when it responded to those letters by citing the reservation of rights language contained in Your Handbook. Section 104 requires a plan administrator, upon request of a plan beneficiary, to furnish a written copy of the latest updated SPD governing that beneficiary's rights. *See* 29 U.S.C. § 1024(b)(4). Plaintiffs' main contention in this regard is that Empire violated § 104 by citing the language from Your Handbook in response to plaintiffs' letters because it contends that Your Handbook did not govern the

plaintiffs' rights. However, as discussed above, the reservation of rights language in Your Handbook is the relevant SPD provision governing Empire's rights and plaintiffs' rights.[3] Empire did not breach its duties under § 104 by providing the reservation of rights language from that SPD in response to plaintiffs' requests for information.

Accordingly, plaintiffs' motion for summary judgment on its claim that Empire failed to comply with § 1024(b)(4) of ERISA is denied and Empire's cross-motion on that claim is granted.

Lastly, plaintiffs claim that they relied detrimentally on a promise of life insurance benefits and that Empire is now estopped from denying them the benefits they claim they are due under the pre-1987 SPDs. In the Second Circuit, the principles of estoppel can apply in ERISA cases only under extraordinary circumstances. *See Schonholz*, 87 F.3d at 78 (citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). The elements of a promissory estoppel claim in an ERISA action are: (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced. *See id.* at 79. To satisfy the extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part. *See id.*; *Berg*, 105 F. Supp. 2d 121, 130 (plaintiff must plead something more than reliance on a promise to the plaintiff's detriment, such as an employer intentionally inducing the employee not to purchase other insurance). Furthermore,

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[3] Plaintiffs allege in their amended complaint that plaintiffs Sanders, Rosenberg, and Snyder wrote inquiries to Empire. All three retired in the normal course of events and their benefits are therefore governed by Your Handbook. None of the plaintiffs who retired pursuant to the VSOP and VIP programs are alleged to have written inquiries to Empire.

ambiguity in a plan document as to whether benefits vest is insufficient when viewed alone or conjunctively to establish extraordinary circumstances. *See Berg* at 130.

Plaintiffs have testified that they continued to work at Empire despite relatively low wages only because they were relying on Empire's relatively copious benefits packages. They further testified that at this late stage in their lives they are finding it difficult to locate and afford replacement life insurance coverage. Although this testimony demonstrates reliance and injury, plaintiffs have not demonstrated that Empire induced them to act in one way or another or misled them *intentionally*, and consequently plaintiffs have not alleged the extraordinary circumstances necessary to state a claim of promissory estoppel under ERISA. *See Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir. 1999) (making a promise in order to induce *particular action* for employer's benefit only later to renege on the promise could amount to "extraordinary circumstances.") (emphasis added). Plaintiffs may have generally relied on receiving the benefits, but have not demonstrated that Empire offered those benefits in an extraordinary situation or in order to induce particular action on plaintiffs' behalf, such as in *Schonholz*, where the defendant offered benefits to the plaintiff for the very purpose of inducing her to retire. *See Schonholz*, 87 F.3d at 78. These benefits were offered in the ordinary course of business and with no demonstrated intent to induce a particular action. Plaintiffs' decision to work for or stay with Empire does not constitute an inducement satisfying the extraordinary circumstances requirement. If the Court were to consider it extraordinary every time an employee chose a job based in part on the quality of an employer's benefits package, the requirement of "extraordinary circumstances" would lose all meaning. Accordingly, plaintiffs' motion for summary judgment on its estoppel claim is denied and Empire's cross-motion on that claim is granted.

Conclusion

Plaintiffs' motion for summary judgment is denied; Empire's cross-motion for summary judgment is granted. The Clerk is directed to enter judgment for the defendant and to close this case.

SO ORDERED:

/s/
Barbara S. Jones
UNITED STATES DISTRICT JUDGE

New York, New York,
October 16, 2000

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CALOGERA ABBRUSCATO, ET AL., Plaintiffs, v. EMPIRE BLUE CROSS AND BLUE SHIELD, Defendant.	99 CIV 2970 (BSJ) OPINION & ORDER

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Introduction

This action is brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, by former employees who retired under various circumstances from defendant Empire Blue Cross and Blue Shield ("Empire") between 1989 and July 1998. The case involves the same reduction of life insurance benefits under Empire's employee benefits plan that was the basis of related and consolidated lawsuits brought by another group of former Empire employees which the Court has recently decided in *Byrnes v. Empire Blue Cross & Blue Shield*, 2000 WL 1538605 (S.D.N.Y. Oct. 18, 2000).

As in *Byrnes*, plaintiffs here seek to enforce the terms of a life insurance plan provided by Empire to its retiring employees as those terms existed before July of 1998, when Empire significantly lowered the amount of its life insurance benefit to retirees. Plaintiffs seek injunctive and declaratory relief under §§ 502(a)(1) and 502(a)(3) of ERISA to enforce their rights under the life insurance plan and to clarify their entitlement to future benefits. Plaintiffs also seek monetary relief under § 502(a)(1) for Empire's wrongful reduction of

their benefits under §§ 404(a)(1)(A), (B) and (D) for breaches of fiduciary duty, and under §§ 502(a)(1) and 502(c)(1) for failure to timely provide benefits information summaries to the plaintiffs. Plaintiffs have also asserted a claim of promissory estoppel and seek to enjoin Empire from further reducing their benefits or retaliating against them. Plaintiffs now move for summary judgment pursuant to Fed. R. Civ. P. 56; defendants oppose and cross-move for summary judgment.

Background

This case differs from *Byrnes* primarily because these plaintiffs[1] argue that the contractual promises vesting their life insurance benefits derive from different sources than the plaintiffs in *Byrnes*. The *Byrnes* plaintiffs relied upon the descriptions of life insurance benefits in employee handbooks distributed by Empire in the early years of their employment prior to 1987. Plaintiffs here ask the Court to find that Empire promised to provide vested life insurance benefits to them based upon exit letters sent to them as retiring employees and based upon representations made by Empire in 1992 during administrative proceedings brought by other former Empire employees involving unemployment insurance benefits. This difference does not alter the result in this case from the result in *Byrnes*. For a fuller discussion of the general background common to both cases, see *Byrnes*.

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[1] This lawsuit is brought by fifty-three former employees of Empire, many of whom retired under different circumstances. However, despite these difference, all of the plaintiffs rely on the same arguments. Because none of the arguments prevails, the Court does not address the claims as to each individual plaintiff.

Summary Judgment Standard

Summary judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold Corp.*, 475 U.S. 654, 655 (1962)). Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). Nonetheless, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

I.

Because Empire's plan involves life insurance, it is classified as an ERISA welfare plan. *See* 29 U.S.C. § 1002(1). The benefits provided by a welfare plan generally are not vested and an employer can amend or terminate a welfare plan at any time. *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997). Although there is no automatic vesting of benefits under an ERISA welfare plan, an employer can vest benefits contractually. *Id.* at 980 ("if an employer promises vested benefits, that promise will be enforced.").

In this case plaintiffs offer only informal communications as evidence to support their claim that Empire contractually vested the life insurance benefit in them. Empire on the other hand has provided formal summary plan descriptions which demonstrate that Empire explicitly retained the right to modify or terminate the plaintiffs' benefits. Accordingly, plaintiffs' claims that Empire contractually vested benefits in them must fail.

First, the plaintiffs argue that exit letters they received as retiring employees vested their retiree life insurance benefit by contractual promise and rendered it unalterable. Plaintiffs' memorandum of law in support of this motion provides only a general model of the exit letters, which states in pertinent part:

> We would like you to know that some of our employee benefits will still be available to you and your spouse during your lifetimes as you retire early on [date]. For this reason, we want you to have the details in writing for your records. . . . The company provided life insurance that you have under our group program with New York Life Insurance Company will also be continued. You are presently insured for [$ amount dependent on retiree's salary]. This amount will be reduced by 10% on your retirement date [retirement date of retiree], and will continue to be reduced by 10% of the original face value during the next four anniversaries of your retirement, each [anniversary date of retirement], until it reaches [$ amount of pre-retirement salary], *where it will remain constant for life.*

(Pl.'s Memo. at 6.) (emphasis added).

Second, the plaintiffs argue that the 1992 administrative proceedings support their claim that Empire never indicated

to them that their life insurance benefit might be eliminated or reduced in the future. Specifically, they point to the testimony of Michael Kent, Empire's Vice President of Human Relations, that Empire had no intention of modifying or eliminating the retiree life insurance benefit. (Pl.'s Memo. at 9.) Plaintiffs also cite a finding of fact by the Unemployment Insurance Appeal Board which stated "There was no indication that the normal benefits to which employees had or could become entitled would be eliminated or reduced at some later date." (Pl.'s Memo Ex. 11.) Plaintiffs further note that Empire incorporated that finding of fact in its Brief when the claimants appealed the Board's determination.

Empire responds that plaintiffs' rights are not governed by the exit letters or by the submissions and testimony, but rather by various official summary employee benefit plan descriptions distributed to the plaintiffs which expressly state that Empire had the right to modify or terminate plaintiffs' life insurance benefit. For those plaintiffs who retired in regular course of business Empire has submitted as it did in *Byrnes* the employee handbook entitled "Your Handbook." Your Handbook was prepared and distributed to Empire's employees sometime before 1989, when none of the plaintiffs here had yet retired. (Ex. O to Becker Aff.) Your Handbook contained a description of Empire's group life insurance plan which explicitly reserved Empire's right to modify, reduce or eliminate the retiree life insurance benefit under the plan. The portion describing the life insurance benefit reads:

> your basic life insurance will be reduced by 10% as of your retirement date, and by an equal amount on each of the next four anniversaries of your retirement date so that 50% of your life insurance coverage remains in force for the rest of your life, at no cost to you.

(Ex. O to Becker Aff., p. 36.) Six pages later, on the bottom of page 42, Your Handbook notes "[o]ther important information about your Group Life Insurance Plan and its administration can be found in the section entitled 'Benefit Administration.' *Id.* at 42. In the Benefit Administration section, under the subheading "Plan Termination Provisions," Your Handbook notes:

> Empire Blue Cross and Blue Shield maintains the Plans for the exclusive benefits of its employees. The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to amend each of the Plans at any time.

Id. at 68.

As in *Byrnes*, Empire argues that the rights of the employees who retired in the regular course of business are governed by the Your Handbook SPD, because Your Handbook was the relevant summary description of Empire's employee benefit plan when those plaintiffs retired. The Court agrees and notes that the Your Handbook SPD contains a provision expressly reserving Empire's right to amend or terminate the life insurance benefit.

Another group of plaintiffs did not retire in the regular course of business but instead accepted an early retirement offer from Empire known as the Voluntary Separation Opportunity Program ("VSOP"). Again, as in *Byrnes*, Empire has submitted The VSOP plan documents describing the plan participants' benefits. That summary contains an explicit reservation of rights clause, which provides:

> The Corporation reserves the right to amend and/or terminate the VSO Program at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require,

> although there are no plans to do so at this time.

(Ex. C to Pacernik Aff.)

A third group of plaintiffs accepted an offer of early retirement from Empire known as the Voluntary Incentive Program ("VIP"). The documents describing the benefits for program participants also include an express reservation of rights clause, which provides "Empire also reserves the right to announce new and different plans and programs as business needs require." (Ex. D to Pacernik Aff.)

At least one plaintiff retired pursuant to a workforce reduction and signed a Separation Agreement and General Release which provides that "Empire reserves the right to change or eliminate, at any time, these retiree medical and life insurance benefits." This agreement also provides that it is the sole and complete understanding between the parties. (Ex. E to Pacernik Aff.)

Finally, Empire also provided the plaintiffs who had not yet retired in 1993 with individual benefits summaries which were given to all Empire employees in that year. The summaries described the levels of the employees' individual benefits, including the life insurance benefit. (Ex. R to Becker Aff.) Those individual benefits summaries also clearly provide "Empire Blue Cross and Blue Shield reserves the right to change or terminate the Plans in whole or in part at any time." *Id.*

Based upon the summary plan documents submitted by Empire and described above, the Court finds that each plaintiff's right to life insurance benefits is governed by a document containing unambiguous language that expressly notifies the plaintiffs of Empire's right to change any of the benefits it offers at any time. Neither the exit letters nor any other evidence submitted by plaintiffs is sufficient to support their claim that Empire contractually vested life insurance in

them, because those letters and representations constitute informal communications under ERISA. When viewed against the formal SPDs submitted by Empire, the SPDs must prevail. *See Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 133 (2d Cir. 1999) (court looks to the relevant ERISA plan documents to determine whether employer promised vested benefits to the plaintiffs); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans.").

That the exit letters which plaintiffs cite do not qualify as plan documents or summary plan descriptions and therefore do not govern plaintiffs' rights is abundantly clear. 29 U.S.C. § 1022(b) sets forth the statutorily required elements of an ERISA summary plan description:

> The summary plan description shall contain the following information: The name and type of administration of the plan ... the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustee (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provision providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the re-

> cords of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance. . . .

Although the retiree exit letters do note the identity of the organizations through which benefits are provided, most letters contain none of the other statutorily required elements. Because they contain so few of the required elements, the letters cannot be considered summary plan descriptions. *See, e.g., Roccbia v. Prudential Ins. Co.*, 74 F. Supp. 2d 240, 247 n.4 (E.D.N.Y. 1999) (document containing only three of the 12 statutorily required categories of information was not an SPD). The exit letters are more akin to individual benefits summaries, which describe the effect of Empire's life insurance plan on the individual employees by setting forth the employee's final salary and calculating the amounts by which the life insurance benefit will decrease in the years following retirement. Such individual benefits summaries do not constitute substantive terms of the general life insurance plan or an SPD describing the life insurance plan. *See Fitch v. Chase Manhattan Bank, N.A.*, 64 F. Supp. 2d 212, 225 (W.D.N.Y. 1999) (holding that erroneous individual benefits summary did not entitle employee to increased benefits). Instead, such summaries constitute informal communications which are incapable of amending Empire's life insurance plan and do not affect Empire's power to modify or terminate the plan. *See id.* at 226 (individual summaries are informal communications); *Moore*, 856 F.2d at 492 ("ERISA plans cannot be amended as a result of informal communications between an employer and plan beneficiaries."). Thus Empire's reserved right to modify or terminate the life insurance benefit is not undermined by the fact that some of the exit letters cited by plaintiffs did not specifically mention that ex-

pressly reserved right; the letters are informal communications rather than SPDs or plan documents.[2]

Therefore in determining whether Empire contractually promised vested life insurance benefits to the plaintiffs, the Court looks not to those exit letters and other representations but rather to the relevant plan documents and SPDs. The Court has decided in *Byrnes* that the unambiguous provisions reserving Empire's right to modify or terminate the benefit contained in Your Handbook and the VSOP, VIP and severance agreements negate any other isolated language in those documents which employees might read as a contractual promise of vested welfare benefits. Accordingly, plaintiffs' rights had not vested and Empire was free as a matter of law to reduce plaintiffs' retiree life insurance benefit to $7500.

The exit letters and representations cited by the plaintiffs are at best extrinsic evidence and cannot be invoked to create an ambiguity which is not evident in the plan documents and SPDs themselves. ERISA "bar[s] consideration of extrinsic evidence where a welfare benefit plan unambiguously reserves the plan administrator's right to amend and terminate the plan." *Moore*, 856 F.2d at 492 n.1.

This Court is mindful that Empire's decision to reduce the plaintiffs' life insurance benefit works a hardship on them, as it does for the plaintiffs in *Byrnes*. However, Empire consistently and expressly reserved the right to amend or

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[2] The Court notes that of the three exit letters provided to the Court, two contain an express reservation of Empire's right to modify or terminate the life insurance benefit and one does not. (*See* letters, Pl.'s Memo, Ex. 8; Def.'s Ex. F. to Pacernick Aff.) This fact serves to illustrate one of the primary reasons informal communications such as these cannot govern the plaintiffs' rights. If the Court made its determination of the plaintiffs' entitlement to benefits based on the differing exit letters in this case, similarly situated employees would have vastly different rights.

terminate the benefit program before any of the plaintiffs retired. As a result, Empire never expressed an intention to vest the life insurance benefits in the plaintiffs and therefore did not violate a contractual promise or ERISA provision when it exercised its expressly reserved rights to diminish the benefit. Plaintiffs' motion for summary judgment on its claims to enforce the terms of the life insurance plan and for wrongful reduction of benefits under §§ 502(a)(1) and (a)(3) of ERISA, 29 U.S.C. §§ 1132(a)(1) and (a)(3) is denied and defendant's cross motion for summary judgment on those claims is granted.

II.

Plaintiffs also claim that Empire breached its fiduciary duty under ERISA §§ 404(a)(1)(A), (B), and (D) by misleading the plaintiffs about their benefits and violated § 104 of ERISA in its responses to plaintiffs who had written Empire for a clarification of their rights in the wake of Empire's decision to modify their life insurance benefits. These claims are identical to the claims asserted by the plaintiffs in *Byrnes* and for the reasons stated more fully in that case, summary judgment in favor of Empire is granted.

III.

Lastly, plaintiffs claim that they relied detrimentally on a promise of life insurance benefits and that Empire is now estopped from denying them the benefits they claim they are due. In the Second Circuit, the principles of estoppel can apply in ERISA cases only under extraordinary circumstances. *See Schonholz v. Long Island Jewish Md. Ctr.*, 87 F.3d 72, 78 (2d Cir 1996) (citing *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993)). The other elements of a promissory estoppel claim in an ERISA action are: (1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced. *See id.* at 79.

As in *Byrnes*, the plaintiffs here cannot establish the necessary elements of a promissory estoppel claim. First, the estoppel claims in this case, as in *Byrnes*, are premised on the breach of a promise that Empire never made: The promise of vested lifetime benefits. Empire only expressed a precatory desire to continue to provide the retiree life insurance to its employees while unambiguously reserving the right to amend or terminate plaintiffs' retiree life insurance. By exercising that right, Empire breached no promise.

Second, plaintiffs have also failed to establish the existence of extraordinary circumstances requirement, a plaintiff must demonstrate a promise that the defendant reasonably should have expected to induce action or forbearance on the plaintiff's part. *See id.*; *Aramony v. United Way Replacement Benefit Plan*, 191 F.3d 140, 154 (2d Cir. 1999) (making a promise in order to induce particular action for an employer's benefit only later to renege on the promise could amount to extraordinary circumstances); *Berg v. Empire Blue Cross and Blue Shield*, 105 F. Supp. 2d 121, 130 (E.D.N.Y.) 2000) (plaintiff must plead something more than reliance on a promise to the plaintiff's detriment, such as an employer intentionally inducing the employee not to purchase other insurance). Plaintiffs' extraordinary circumstances argument differs from that in *Byrnes* because some of the plaintiffs have alleged more than that they relied generally on the benefits offered by Empire in deciding whether to continue working there. The early retirees have alleged that Empire induced them into the particular action of retiring early by promising them life insurance benefits in severance packages. However, the primary evidence plaintiffs cite to support their allegation of inducement to retire after the retiree exit letters, which could not have served as an inducement for plaintiffs to retire because the letters clearly show that they were received *after the plaintiffs had made the decision to retire.*

Furthermore, the retirement life insurance benefit that Empire offered in its various early retirement programs is exactly the same as the benefit offered to employees who retire in the normal course of events. Because Empire's alleged promise of continued life insurance benefits in its early retirement packages did not promise the plaintiffs a benefit to which they would not otherwise be entitled in the normal course of business, the promise does not constitute the type of "remarkable consideration" to induce the plaintiffs' early retirement which would support a finding of extraordinary circumstances. *See Devlin v. Transportation Communications Int'l Union*, 173 F.2d 94, 103 (2d Cir. 1999) (discussing *Schonholz*, 87 F.3d at 78).

Accordingly, plaintiffs' motion for summary judgment on its estoppel claim is denied and Empire's cross-motion on that claim is granted. Furthermore, defendant's motion for summary judgment on plaintiffs' claim for an injunction is granted. As the foregoing analysis demonstrates, the plaintiffs cannot prevail on the merits of their claims and are therefore not entitled to injunctive relief.

Conclusion

Plaintiffs' motion for summary judgment is denied; Empire's cross-motion for summary judgment is granted. The Clerk is directed to enter judgment in favor of the defendant and to close the case.

SO ORDERED:

/s/
Barbara S. Jones
UNITED STATES DISTRICT
JUDGE

New York, New York,
October 23, 2000

APPENDIX E

UNITED STATES COURT OF APPEALS
For The Second Circuit
United States Court House
40 Foley Square
New York, 10007

Roseann B. MacKechnie
Clerk

At a stated term of the United Sates Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February two thousand two.

Kunkel, et al.

Plaintiffs-Appellants,

v. Dkt No: 00-9469

Empire Blue Cross

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee Empire Blue Cross.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/

Arthur M. Heller,
Administrative Attorney

APPENDIX F

UNITED STATES COURT OF APPEALS
For The Second Circuit
United States Court House
40 Foley Square
New York, 10007

Roseann B. MacKechnie
Clerk

DC: SDNY
DC Docket: 99-cv-2970
DC Judge: Jones

At a stated term of the United Sates Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of February two thousand two.

Calogera Abbruscato, et al.

Plaintiffs,

Irma M. Alicea, et al. Dkt No: 00-9490

Plaintiffs-Appellants,

Empire Blue Cross and Blue Shield

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the defendant-appellee.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By:_____/s/_____
Arthur M. Heller,
Administrative Attorney

APPENDIX G

TITLE 29—LABOR

CHAPTER 18—EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER 1—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE A—GENERAL PROVISIONS

* * * * *

§ 1002. Definitions

* * * * *

(21)(A) [A] person is a fiduciary with respect to a plan to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or has any authority or responsibility to do so, or

(iii) he has any discretionary responsibility in the administration of such plan.

* * * * *

SUBTITLE B—REGULATORY PROVISIONS
Part 2—Participation and Vesting

§ 1051. Coverage

This part shall apply to any employee benefit plan . . . other than—

(1) an employee welfare benefit plan . . . . .

* * * * *

SUBTITLE B—REGULATORY PROVISIONS
Part 4—Fiduciary Responsibility

* * * * *

§ 1104. Fiduciary duties

(a)(1) [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries ;

* * * * *

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * * *

(D) in accordance with the documents and instruments governing the plan . . . .

* * * * *

SUBTITLE B—REGULATORY PROVISIONS
Part 5—Administration and Enforcement

* * * * *

§ 1132. Civil enforcement

(a) A civil action may be brought—

(1) by a participant or beneficiary—

* * * * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

* * * * *

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a) Include brief statement of facts with page references to the moving papers.

Francis J. Devlin,

Plaintiff,

Richard G. Kunkel, et al.

Plaintiffs-Appellants

-against-

Empire Blue Cross and
Blue Shield

Defendant-Appellee

00-9469

Docket Number

MOTION INFORMATION FORM

Motion for Late filing of rehearing petition

MOTION BY: (Name, address and tel. no. of law firm and attorney in charge of case)

Gary H. Glaser, Esq. and Craig Pacernick, Esq.
Seyfarth Shaw
1279 Avenue of the Americas
New York, NY 10020
(212) 218-5500

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Meredith H. Savitt, Esq.
Hite & Savitt, P.C.
63 Colvin Avenue
Albany, New York 12206

Has consent of opposing counsel:

A. been sought? ☐ Yes ☒ No
B. been obtained: ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired: ☐ Yes ☒ No
(Substantive motions only)

Requested return date: January 29, 2002
(*See* Second Circuit Rule 27(b).)
Has argument date of appeal been set:
A. by scheduling order: ☐ Yes ☒ No
B. By firm date/argument notice? ☐ Yes ☒ No
C. If yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? ☐ Yes ☒ No
(*See* F.R.A.P. Rule 8.)

Any previous request for similar relief made to the 2nd Circuit? ☐ Yes ☒ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No
If no, explain why not:

N/A

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

N/A

Judge or agency whose order
is being appealed

Brief statement of the relief requested:

Acceptance of rehearing petition filed minutes late

By: (Signature of Attorney)
Signed name must be printed beneath.

Gary H. Glaser

Date: January 2, 2002

Empire Blue Cross and Blue Shield
Appearing for: (Name of Party)

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant

Appellee or Respondent: ☐ Plaintiff ☒ Defendant

ORDER

Before: Hon. Dennis Jacobs, Hon. F.I. Parker, Hon. Sonia Sotomayor, *Circuit Judges*

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by

/s/
Arthur M. Heller, Administrative Attorney

Jan. 14, 2002

APPENDIX I

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Each motion must be accompanied by a supporting affidavit with statement of issues. (Local Rule 27(a)) Include brief statement of facts with page references to the moving papers.

Calogera Abbruscato, et al.,

Plaintiffs,

Irma Alicea, et al.

Plaintiffs-Appellants

-against-

Empire Blue Cross and
Blue Shield

Defendant-Appellee

00-9490

Docket Number

MOTION INFORMATION FORM

Motion for Late filing of rehearing petition

MOTION BY: (Name, address and tel. no. of law firm and attorney in charge of case)

Gary H. Glaser, Esq. and Craig Pacernick, Esq.
Seyfarth Shaw
1279 Avenue of the Americas
New York, NY 10020
(212) 218-5500

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and attorney in charge of case)

Alvin Green, Esq.
Seham, Seham, Meltz & Petersen
122 East 42nd Street, Suite 1611
New York, New York 10168
(212) 557-9577

Has consent of opposing counsel:

A. been sought?	☐ Yes ☒ No
B. been obtained:	☐ Yes ☒ No
Has service been effected?	☒ Yes ☐ No
Is oral argument desired: (Substantive motions only)	☐ Yes ☒ No

Requested return date: January 29, 2002
(*See* Second Circuit Rule 27(b).)
Has argument date of appeal been set:

A. by scheduling order:	☐ Yes ☒ No
B. By firm date/argument notice?	☐ Yes ☒ No

C. If yes, enter date: _____

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? (*See* F.R.A.P. Rule 8.)	☐ Yes ☒ No
Any previous request for similar relief made to the 2nd Circuit?	☐ Yes ☒ No
Would expedited appeal eliminate need for this motion?	☐ Yes ☒ No

If no, explain why not:

N/A

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

N/A

Judge or agency whose order is being appealed:

_____

Brief statement of the relief requested:

Acceptance of rehearing petition filed minutes late

By: (Signature of Attorney)
Signed name must be printed beneath.

Gary H. Glaser

Date: January 2, 2002

Empire Blue Cross and Blue Shield
Appearing for: (Name of Party)

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant

Appellee or Respondent: ☐ Plaintiff ☒ Defendant

ORDER

Before: Hon. Dennis Jacobs, Hon. F.I. Parker, Hon. Sonia Sotomayor, *Circuit Judges*

IT IS HEREBY ORDERED that the motion be and it hereby is GRANTED.

FOR THE COURT,
ROSEANN B. MACKECHNIE, Clerk
by

/s/
Arthur M. Heller, Administrative Attorney

Jan. 17, 2002